

**DON'T TUG ON SUPERMAN'S CAPE:<sup>1</sup> IN DEFENSE OF  
CONVENING AUTHORITY SELECTION AND  
APPOINTMENT OF COURT-MARTIAL PANEL MEMBERS**

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*An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence.<sup>3</sup>*

*Yet, when it is proposed that that same general, with those incalculable powers of life and death over his fellow citizens, be permitted to appoint a court for the trial of a soldier who has stolen a watch, oh, no, we can't have that . . . . And I say, if you trust him to command, if you trust him with only the lives and destinies of these millions of citizens under his command, that actually with the future of the country, because if he fails, things are going*

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1. "You don't tug on Superman's cape/You don't spit into the wind/You don't pull the mask off that old Lone Ranger/And you don't mess around with Jim." JIM CROCE, *You Don't Mess Around with Jim*, on YOU DON'T MESS AROUND WITH JIM (ABC Records 1972).

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3. General William Tecumseh Sherman, *quoted in Hearings on H.R. 2498 Before Subcomm. of the House Comm. on Armed Services*, 81st Cong. 789 (1949) (statement of Frederick Bernays Wiener), *reprinted in* INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000) [hereinafter *House Hearings*].

*to be rough, you can certainly trust him with the appointment of a court.*<sup>4</sup>

## I. Introduction

From the earliest beginnings of our republic, military commanders have played a central role in the administration of military justice. The American military justice system, derived from its British predecessor, predates the Articles of Confederation and the Constitution.<sup>5</sup> Although the system has evolved considerably over the years to its current state of statutory codification in the Uniform Code of Military Justice (UCMJ),<sup>6</sup> one thing has remained constant: courts-martial in the United States military are, and always have been, ad hoc tribunals<sup>7</sup> created and appointed by the order of a commander, called a convening authority,<sup>8</sup> for the express purpose of considering a set of charges that the commander has referred to the court.<sup>9</sup>

In turn, the members of the court, who in nearly every case are under the command of the convening authority,<sup>10</sup> take an oath to “faithfully and impartially try, according to the evidence, [their] conscience, and the laws applicable to trial by court-martial, the case of the accused” before their court.<sup>11</sup> By their oath, when they sit in judgment in a military courtroom, panel members leave behind the commander who appointed them.<sup>12</sup>

The modern American military justice system is a creature of statutes that draw their authority from Congress’s constitutional responsibility to

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4. *Id.* at 800.

5. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 47 (2d ed. 1920 reprint). Colonel Winthrop notes that the English military tribunal was transplanted to the United States before the American Revolution, recognized and adopted by the Continental Congress, and continued in existence with the Constitution and congressional implementing legislation of 1789. *Id.*

6. 10 U.S.C. ch. 47 (2000).

7. See WINTHROP, *supra* note 5, at 49-50 (noting that a court-martial is “called into existence by a military order and by a similar order dissolved when its purpose is accomplished . . . [.] transient in its duration and summary in its action”).

8. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(a)* (2002) [hereinafter MCM] (“A court-martial is created by a convening order of the convening authority.”).

9. *Id.* R.C.M. 601(a) (“Referral is the order of a convening authority that the charges against an accused will be tried by a specified court-martial.”).

10. *Id.* R.C.M. 503(b)(3).

11. *Id.* R.C.M. 807(b)(2) discussion.

make “Rules for the Government and Regulation of the land and naval Forces.”<sup>13</sup> Its ultimate purpose is to help ensure the security of the nation by means of a well-disciplined military.<sup>14</sup> No other system of justice in our nation carries an equivalent burden.

The modern court-martial has been extensively civilianized and, in more ways than not, closely resembles trial in federal district court.<sup>15</sup> A military judge presides over the court-martial, rules on evidentiary matters, and instructs the panel.<sup>16</sup> The court-martial is an adversarial proceeding in which a trial counsel prosecutes the government’s case, and the accused is represented either by appointed military defense counsel, a civilian defense counsel, or a combination of the two.<sup>17</sup> The accused in a court-martial, unlike a defendant in the federal system, has an absolute right to elect trial by judge alone or by a panel in non-capital cases.<sup>18</sup> Although there are many functional differences between a court-martial panel and a

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12. To a professional military officer or noncommissioned officer, taking an oath is no light thing. Herman Melville, no friend of military justice, observed, “But a true military officer is in one particular like a true monk. Not with more of self-abnegation will the latter keep his vows of monastic obedience than the former his vows of allegiance to martial duty.” HERMAN MELVILLE, *Billy Budd, Sailor* (1924), in GREAT SHORT WORKS OF HERMAN MELVILLE 481 (1969).

13. U.S. CONST., art. I, § 8, cl. 14.

14. See MCM, *supra* note 8, pt. I, ¶ 3. The Preamble to the *Manual for Courts-Martial* contains a statement defining the purposes of the military justice system: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” *Id.*

15. In fact, the UCMJ requires the President of the United States to prescribe rules of procedure and evidence at courts-martial “which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.” UCMJ art. 36(a) (2002).

16. See *id.* art. 26(a) (listing the requirements for military judges and also some of their duties).

17. See *id.* art. 38.

18. Compare *id.* art. 16 (noting that in general and special courts-martial, an accused may be tried either by members or, at his election and with the approval of the military judge, by the military judge alone), with FED. R. CRIM. P. 23(a) (requiring approval of the judge and the prosecutor before a defendant is permitted trial by judge alone). See also UCMJ art. 18 (stating that a general court-martial consisting of a military judge alone does not have jurisdiction to try capital cases).

jury,<sup>19</sup> both perform the similar fact-finding role of listening to the evidence and determining guilt or innocence beyond a reasonable doubt.

But there is a fundamental difference that many scholars, observers, and critics of the military justice system find troubling: Under Article 25(d)(2) of the UCMJ, the convening authority personally selects members of the court who, “in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>20</sup> There are no voter-registration or driver’s license lists, no venire panels or jury wheels, and no random selection of a representative cross-section of the community required in a court-martial under the UCMJ. Members are selected at the will of their commander. The subjective nature of this statutory mandate to select court members according to the personal judgment of the convening authority is, in the words of a former Chief Judge of the United States Court of Appeals for the Armed Forces (CAAF), “the most vulnerable aspect of the court-martial system; the easiest for critics to attack.”<sup>21</sup>

And attack they have, on several fronts, in a campaign that began early in the twentieth century,<sup>22</sup> pressed on through the legislative debates surrounding the passage of the UCMJ in 1950,<sup>23</sup> and continues today. The popular press,<sup>24</sup> numerous scholars,<sup>25</sup> and even an independent commission<sup>26</sup> have all waged relentless warfare against convening authority appointment of court members. The battles have not been confined to our shores. Two of the United States’ closest allies, Canada and Great Britain, whose systems were once very similar to America’s, have bowed to the

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19. For example, a court-martial panel also performs the judicial function of sentencing the accused. *See* UCMJ art. 51(a) (setting out the procedure for voting on both findings and sentence); MCM, *supra* note 8, R.C.M. 1005(e)(4) (requiring the military judge to instruct the members that “they are solely responsible for selecting an appropriate sentence”). In addition, the UCMJ still provides for a special court-martial without a military judge, in which a panel of at least three members handles all judicial functions. *See* UCMJ art. 16(2). Procedurally, the court-martial panel interacts at trial in a manner virtually unknown to the modern American criminal justice system: the panel members are permitted to take notes, question the witnesses, and request witnesses of their own. *See infra* note 569 and accompanying text.

20. UCMJ art. 25(d)(2).

21. *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (Cox, J., concurring).

22. *See infra* note 165 and accompanying text.

23. *See infra* note 195 and accompanying text.

24. *See, e.g.*, Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19, 21 (claiming that the convening authority’s power to pick jurors is “the Achilles heel” of the system).

judgment of higher courts and removed commanders altogether from the process of convening courts-martial and personally appointing members.<sup>27</sup>

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25. See, e.g., Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendation to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (advocating substantial structural reforms of the military justice system, including removal of the commander from the panel member selection process); Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000) (suggesting a random selection system that would eliminate the need for UCMJ Article 25(d)(2) criteria); Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195 (2000) (discussing world-wide changes in various military justice systems and suggesting that the UCMJ fall in with major world trends); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 Sw. U. L. REV. 481 (1999) (pessimistically suggesting that nothing can be done to eliminate unlawful command influence, and recommending scrapping the UCMJ during peacetime); Matthew J. McCormack, Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999) (arguing that the time has come to remove the convening authority from the panel selection process and substitute random selection); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998) (claiming that the statutory panel member selection process is unconstitutional and advocating random panel selection); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992) (recommending substantive changes to UCMJ Article 25(d)(2), the establishment of a neutral panel commissioner, and random selection of panel members); David M. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991) (observing that the practice of convening authority appointment at least looks bad, and noting that a computer-assisted random selection process should not be too difficult to implement); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 1978 A.F. L. REV. 343 (discussing the problems inherent with command selection of court-member appointment and recommending changes to panel size and a random selection scheme); Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972-1973) (recommending removal of the commander from the court-member appointment process and substituting a random selection scheme based on the then-current ABA Standards for Criminal Justice); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 143 (1972) (arguing that the panel selection system of the UCMJ is in conflict with the Constitution, and recommending random selection to solve the problem); Major Rex R. Brookshire II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (advocating a random selection system that fulfills the Article 25 “best-qualified” criteria). But see Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV. 1 (1998) (recognizing the perception problem with the court-member selection process, but opining that the current system produces better panels than any other system would, and asserting that a random selection system could be administratively cumbersome and disruptive of military operations).

26. See, e.g., HONORABLE WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [hereinafter COX COMMISSION].

An activist majority of the CAAF recently opened a new front in this war in the controversial case of *United States v. Wiesen*,<sup>28</sup> in which it held that a military judge had abused his discretion in denying a defense challenge for cause of a panel president who had a supervisory relationship over enough of the panel members to form the two-thirds majority necessary to convict.<sup>29</sup> Over the vigorous dissent of Chief Judge Crawford and Senior Judge Sullivan, the majority employed its own implied bias doctrine to limit significantly a commander's ability to select subordinate commanders to serve on panels who might otherwise meet the statutory criteria of age, education, training, experience, length of service, and judicial temperament.<sup>30</sup>

Yet Congress has not seen fit to remove from the commander the duty to appoint court-martial members according to subjective criteria. The issue of command appointment of court members existed and was thoroughly debated when Congress created the UCMJ in the late 1940s and early 1950s. From time to time, Congress has re-visited the issue, most recently in 1999 when it directed the Joint Services Committee (JSC) on Military Justice to study random selection of court-martial panel members.<sup>31</sup> The JSC recommended retaining the current system of discretion-

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27. *See* R. v. Genereux, [1992] S.C.R. 259 (invalidating role of convening authority in Canadian military justice system as a violation of the Canadian Charter of Rights and Freedoms guarantee of an independent and impartial tribunal); *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) (invalidating the role of the convening authority in the British military justice system as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantee of an independent and impartial tribunal).

28. 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2001).

29. *Id.* at 176. In *Wiesen*, the accused was convicted by a general court-martial of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice, and he was sentenced to twenty years' confinement, a dishonorable discharge, reduction to E-1, and total forfeitures of pay and allowances. The original court-martial panel president was a maneuver brigade commander at Fort Stewart, Georgia. He had either a direct command relationship or potential supervisory relationship over six of the nine court-martial panel members. The military judge conducted a thorough voir dire in which all parties agreed that they would not be influenced by this relationship. The defense counsel challenged the panel president based on the CAAF's implied bias doctrine, and the military judge denied the challenge. The defense counsel used a peremptory challenge to remove the panel president and preserve the issue for appeal. *Id.* at 173-74. Ironically, the panel that actually heard the case and rendered the verdict and sentence no longer included the original panel president.

30. *See id.* at 176 ("[I]n this case, the Government has failed to demonstrate that operational deployments or needs precluded other suitable officers from reasonably serving on this panel, thus necessitating the Brigade Commander's participation.") These factors are not in the text of UCMJ Article 25(d)(2) or any of the Rules for Courts-Martial.

ary command appointment,<sup>32</sup> and Congress has not revisited the issue since.

Moreover, the Article III courts have shown great deference to the collective judgment of Congress on matters of military justice. On collateral review, lower federal courts have found no constitutional or due process infirmities in the UCMJ's statutory requirement for the convening authority to apply personal judgment—that skill most valued in a commander—to appoint court members.<sup>33</sup>

Thus, even as critics assail the commander's role in selecting panel members, the statute remains intact, undisturbed by either Congress or the Article III courts. This article explores the historical, constitutional, and practical dimensions of the congressional decision to maintain command control over the court-member appointment process and concludes that the system meets the due process standards of an Article I court, while permitting Congress to achieve its goal of creating a fair, efficient, and practical system that works worldwide, in garrison or in a deployed environment, in time of peace or war. Command control of the court-member appointment process is vital to maintaining a system of military justice that balances the needs of the military institution with the rights of the individual.

Section II of this paper plumbs the historical underpinnings and constitutional framework of command control of the court-martial system. Section III addresses and defends against contemporary attacks on convening authority panel selection. Finally, section IV proposes a two-phase strategy to help ensure the preservation of convening authority panel selection.

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31. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920.

32. U.S. DEP'T OF DEFENSE, JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999) [hereinafter JSC REPORT].

33. See, e.g., *McDonald v. United States*, 531 F.2d 490, 493 (Ct. Cl. 1976) (noting that Congress deliberately continued the historical scheme of convening authority panel member appointment over strong objections to the process).

## II. Historical and Constitutional Foundations of Court-Martial Panel Selection

The statutory role of the convening authority in appointing court-martial panel members is built on a firm historical foundation that predates the Constitution. Military tradition alone, however, is not sufficient to justify the practice; the Constitution is the only source of power authorizing action by any branch of government.<sup>34</sup> It is an inescapable historical reality<sup>35</sup> that even as the Framers guaranteed the right of a jury trial both in the text of the Constitution<sup>36</sup> and in the Bill of Rights,<sup>37</sup> they denied it to those serving in the armed forces. And Congress, from the beginning, has retained the long-standing practice of a convening authority personally selecting the members of a court-martial panel.

This section first reviews the historical tradition of court-martial panel selection. It then examines the constitutional framework for the government of the military. Third, the section traces the history of congressional oversight of the panel member selection process. Finally, the section analyzes the statutory due process system of courts-martial in the context of congressionally created legislative court systems.

### A. Historical Development of the American Court-Martial Panel

#### 1. *Origins and Nature of Military Tribunals*

According to William Winthrop tribunals for the trial of military offenders have “coexisted with the early history of armies.”<sup>38</sup> The modern court-martial is deeply rooted in systems that predated written military

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34. *Dorr v. United States*, 195 U.S. 138, 140 (1904) (noting that the Constitution is the only source of power authorizing action by any branch of government).

35. *But see* Glazier, *supra* note 25. Glazier insists that a military panel is actually a jury within the wider definition of the term that he advocates. *Id.* at 17-18. He also asserts that the Supreme Court’s long-standing position that neither the Article III nor the Sixth Amendment jury trial guarantees apply to the military is wrong. *See generally id.* at 14-31.

36. U.S. CONST. art. III, § 2, cl. 3.

37. *Id.* amend. VI.

38. WINTHROP, *supra* note 5, at 45.

codes and were designed to bring order and discipline to armed and sometimes barbarous fighting forces.<sup>39</sup>

Both the Greeks and the Romans had military justice codes, although no written versions of them remain.<sup>40</sup> Justice in the Roman armies was administered by *magistri militum* or by legionary tribunes, who served either as sole judges or operated with the assistance of councils.<sup>41</sup> Written military codes of various European societies, including Salians, Goths, Lombards, Burgundians, and Bavarians,<sup>42</sup> date back to the fifth century and demonstrate the historical importance of codes and systems of justice in governing armies.

Nearly every form of military tribunal included a trial before a panel or members of some type.<sup>43</sup> During times of peace among the early Germans, the Counts, assisted by assemblages of freemen, conducted judicial proceedings; in time of war, the duty shifted to Dukes or military chiefs, who usually delegated the duty to the priests who accompanied the Army. Later, the Germanic system featured regimental courts in which both soldiers and officers were eligible as members. In special cases involving high commanders, the King would convene a court consisting of bishops and nobles.<sup>44</sup> The Emperor Frederick III instituted courts-martial proper, *militärgerichts*, in his Articles of 1487, including what Winthrop calls “the remarkable spear court,” in which “the assembled regiment passed judgment upon its offenders.”<sup>45</sup>

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39. Captain(P) David M. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

40. See Major Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 11 (1985); WINTHROP, *supra* note 5, at 17.

41. WINTHROP, *supra* note 5, at 45; see also Schlueter, *The Court-Martial*, *supra* note 39, at 131.

42. WINTHROP, *supra* note 5, at 17-18. Winthrop points out that these codes were all civil as well as military, “the civil and military jurisdictions being scarcely distinguished and the civil judges being also military commanders in war.” *Id.* at 18.

43. See generally *id.* at 45-47 (listing several examples of different tribunals and their membership).

44. *Id.* at 45.

45. *Id.* at 46.

## 2. *Development of the British Court-Martial System*

### a. *Court of Chivalry and Code of King Gustavus Adolphus*

By far the greatest influence on the modern court-martial, however, came from two different systems, the Court of Chivalry in England and the military code of Sweden's King Gustavus Adolphus.<sup>46</sup> These courts both struck a balance between the demands of good order and discipline and concepts of due process,<sup>47</sup> thereby laying a foundation for modern systems of military justice that strive to do the same.

William the Conqueror brought the Supreme Court—the *Aula Regis*—with him from Normandy to England in the eleventh century.<sup>48</sup> The court was physically located with the king, and it had a broad jurisdictional mandate that included military matters. In the thirteenth century, under Edward I, the *Aula Regis* was subdivided to provide for a separate military justice forum.<sup>49</sup> This court, known as the Court of Chivalry, featured a panel in which the commander of the armies served as the lord high constable and presided over a court consisting of the earl marshal, three doctors of civil law, and a clerk-prosecutor.<sup>50</sup> When the constable did not preside over the court, the next-ranking member of the Army, the earl marshal, assumed this responsibility; in this guise, the court was considered a military court or court of honor. The court followed the Army into the field during wartime and served as a standing or permanent forum.<sup>51</sup> By the eighteenth century, legislative restrictions caused the Court of Chivalry to fall into disuse; its broad jurisdiction into both civil and criminal matters had infringed too much on the common law courts.<sup>52</sup> It did, however, play a significant role in the development of the British Articles of War.<sup>53</sup>

The Swedish military code of King Gustavus Adolphus, promulgated in 1621, was also tremendously influential in the development of the Brit-

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46. Schlueter, *The Court-Martial*, *supra* note 39, at 132.

47. *Id.* at 134.

48. WINTHROP, *supra* note 5, at 46.

49. Schlueter, *The Court-Martial*, *supra* note 39, at 136; *see also* WINTHROP, *supra* note 5, at 46

50. Schlueter, *The Court-Martial*, *supra* note 39, 136-37. The court had jurisdiction over civil and criminal matters involving both soldiers and camp followers. *See id.*

51. *Id.* at 137.

52. *Id.* at 137-38; *see also* WINTHROP, *supra* note 5, at 46.

53. *See* Schlueter, *The Court-Martial*, *supra* note 39, at 135 (stating that in its concern for honor and due process, the Court of Chivalry was a significant benchmark in the history of the court-martial).

ish Articles,<sup>54</sup> for the simple reason that large numbers of British subjects served as officers and soldiers in the armies of the Swedish king.<sup>55</sup> Many provisions of the British Articles evolved directly from the Gustavus Adolphus Code.<sup>56</sup>

The Gustavus Adolphus Code contained explicit provisions concerning the membership of courts-martial, some vestiges of which remain in today's UCMJ.<sup>57</sup> There were two levels of courts-martial, the regimental court (referred to in the Code as the "lower Court")<sup>58</sup> and the standing court-martial (called the "high Court").<sup>59</sup>

The Gustavus Adolphus Code explicitly set out the composition of the regimental court by rank and position. In the cavalry, the commander was president (in his absence, the Captain of the Life-Guards), and the court consisted of "three Captains[,] . . . three Lieutenants, three Cornets, and three Quarter-masters" to form a court-martial panel of thirteen.<sup>60</sup> In the infantry, the court consisted of either the commander or his deputy as

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54. See Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970) (noting that the British Articles of War had evolved from the code promulgated by Gustavus Adolphus and not from the English common law).

55. See WINTHROP, *supra* note 5, at 19 n.15.

56. *Id.* at 19. Commenting on the Gustavus Adolphus Code, Winthrop stated:

In reading these (one hundred and sixty-seven in number), it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions. In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

*Id.*

57. See, e.g., UCMJ art. 16 (2002) (establishing three levels of court-martial: the general court-martial, with a military judge and not less than five members or a military judge alone; the special court-martial, with either three members, a military judge and not less than three members, or a military judge alone; and a summary court-martial, consisting of one commissioned officer).

58. Code of Articles of King Gustavus Adolphus of Sweden, art. 138 [hereinafter Gustavus Adolphus Code], reprinted in WINTHROP, *supra* note 5, at 907. In directly quoting provisions of the Gustavus Adolphus Code, this article has preserved original spellings.

59. Schlueter, *The Court-Martial*, *supra* note 39, at 132-33.

60. Gustavus Adolphus Code, *supra* note 58, art. 140.

president and “two Captains[,] . . . two Lieutenants, two Ensigns, four Serjeants, and two Quarter-Masters,” again for a panel of thirteen.<sup>61</sup>

The high court likewise had explicit membership requirements. The General served as President of the Court, and members included the “Field-Marshal, . . . the Generall of the Ordinance, . . . Serjeant-Major-Generall[,] . . . Generall of the Horse, . . . Quarter-Master-Generall[,] . . . and the Muster-Master-Generall” as well as every regimental colonel, men in the Army of good understanding, and even “Colonells of strange Nations.”<sup>62</sup>

The two courts differed in jurisdiction. The regimental court heard cases of theft, insubordination, minor offenses, and minor civil issues.<sup>63</sup> The high court handled matters affecting an officer’s life or honor,<sup>64</sup> as well as serious offenses, to include treason and conspiracy.<sup>65</sup> If an accused suspected “our lower Court to be partiall anyway,” he could appeal to the high court, which would then decide the matter.<sup>66</sup>

Members of the court-martial were required to take an oath, by which they promised to

Judge uprightly in all things according to the Lawes of God, or our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty that I find guilty.<sup>67</sup>

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61. *Id.* art. 141.

62. *Id.* art. 143.

63. Schlueter, *The Court-Martial*, *supra* note 39, at 134.

64. *Id.* at 133.

65. *Id.* at 134.

66. Gustavus Adolphus Code, *supra* note 58, art. 151.

67. *Id.* art. 144.

With very few substantive modifications, this oath carried through the British Articles of War, the American Articles of War, and into the modern UCMJ.<sup>68</sup>

Several aspects of the Gustavus Adolphus Code are significant to the historical development of panel member selection. First, the Code required direct involvement of the commander, both in serving as the president of the court-martial and in selecting the members of the court. Second, the Code established a system that limited the discretion of the commander, both in the size and in the composition of the court; for instance, in a regimental court of the infantry, the commander had to select two captains, two lieutenants, two ensigns, four sergeants, and two quartermasters. Third, the Code recognized that in some cases an accused might suspect a regimental court to be biased and, accordingly, granted the accused a right of appeal to the higher court on that basis.

*b. The Mutiny Act and the Articles of War*

The Court of Chivalry faded into history in the sixteenth century,<sup>69</sup> but the need for military justice did not. England's rulers still faced "the problem of maintaining military discipline in a widely dispersed army."<sup>70</sup> The solution was to form military courts by issuance of royal commissions or by including special enabling clauses in the commissions of high-ranking commanders.<sup>71</sup> These tribunals eventually became known as courts-martial. These early courts-martial, like those under the Gustavus Adol-

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68. See *supra* note 11 and accompanying text; *infra* notes 105, 126 and accompanying text.

69. See Schlueter, *The Court-Martial*, *supra* note 39, at 137 (noting that the Court of Chivalry survived until 1521). Interestingly, the Court of Chivalry still maintains jurisdiction over questions relating to the right to use armorial ensigns and bearings. It did not sit at all from 1737 to 1954. See James Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. REV. 478 (1969), reprinted in Bicentennial Issue, MIL. L. REV. 25, 28 (1975).

70. Schlueter, *The Court-Martial*, *supra* note 39, at 139. The problems posed by a widely dispersed military remain today. As of 30 September 2002, out of a total strength of 1,411,634 personnel, 230,484 were deployed or stationed overseas. See DIRECTORATE FOR INFORMATION OPERATIONS AND REPORTS, U.S. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND COUNTRY (Sept. 30, 2002), available at <http://web1.whs.osd.mil/mmid/m05/hst0902.pdf>. Since the information for this report was gathered, the United States has deployed significant forces both to Afghanistan and to South-west Asia for combat.

71. Schlueter, *The Court-Martial*, *supra* note 39, at 139; cf. UCMJ arts. 22-24 (2002) (delineating who may convene general, special, and summary courts-martial).

phus Code, were convened by a commander who also sat on the court as its president.<sup>72</sup> The courts had plenary jurisdiction and operated only in wartime.

The period between the Court of Chivalry and the passage of the initial Mutiny Act in 1689<sup>73</sup> was tumultuous, characterized by struggles between the monarchy, which sought to expand the jurisdiction of military tribunals against civilians, and Parliament, which desired to limit significantly the reach of military jurisdiction. In 1642, Parliament promulgated direct legislation authorizing the formation of military courts, appointing a commanding general and fifty-six other officers as commissioners to execute military law.<sup>74</sup> Twelve or more of these officers had to be present to form a quorum, and the tribunal was authorized to appoint a judge advocate, provost marshal, and other officers considered necessary.<sup>75</sup>

Although it authorized the formation of courts-martial, Parliament never legislatively created them, fearing that by so doing it would obligate itself to support a standing army. Charles II, however, was permitted to maintain an army at his own expense. In recognition of the need to provide discipline for his troops, Charles II issued Articles of War in 1662.<sup>76</sup> The Articles of War were not acts of Parliament, but instead were issued by the monarch in his capacity as the executive.<sup>77</sup>

These early Articles of War reflected a concern with due process<sup>78</sup> and panel member composition. Under the 1686 “English Military Discipline” of James II, for example, a court-martial had to consist of at least seven officers, including the president. There was a preference for officers in the rank of captain or above; the Code states that “if it so happen that there be not Captains enough to make up that Number, the inferiour Offic-

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72. Schlueter, *The Court-Martial*, *supra* note 39, at 139.

73. 1 W. & M., c. 5 (1689) (Eng.).

74. Schlueter, *The Court-Martial*, *supra* note 39, at 138-40.

75. *Id.* at 141.

76. *Id.* at 141 n.38.

77. *See id.* at 143. The Articles of War had a long history in England. They were generally promulgated directly by the King as an exercise of his royal prerogative, although in some cases the generals commanding the armies of the King were authorized to promulgate their own Articles of War. *See* WINTHROP, *supra* note 5, at 18-19.

78. Schlueter, *The Court-Martial*, *supra* note 39, at 140 (observing that, over time, the Articles of War evolved and showed “an increased interest in military due process”).

ers may be called in.”<sup>79</sup> There was otherwise no limitation on the commander’s discretion in appointing the members of the court.

Following the mutiny and desertion of a group of Scottish troops who refused to obey orders to deploy to Holland, Parliament enacted the first Mutiny Act in 1689.<sup>80</sup> By the customs of war, the offenses were punishable by death. Domestic law at the time, however, forbade the executive (and the court-martial of the day was solely an instrument of the executive) from adjudging the death penalty in England during a time of peace,<sup>81</sup> although courts-martial could adjudge the penalty abroad.<sup>82</sup> Because of the mutiny, Parliament had little trouble enacting a provision that granted courts-martial the ability to adjudge the death penalty for mutiny or desertion domestically, provided that at least nine of thirteen officers present in the tribunal voted for it.<sup>83</sup> The initial Mutiny Act remained in force for seven months, but with only a relatively minor exception, was renewed annually until it was allowed to expire in 1879.<sup>84</sup>

It became customary to publish the Articles of War, which were promulgated by the executive, alongside the annual Mutiny Act.<sup>85</sup> In 1712, the Act was extended to Ireland and the colonies. In 1717, Parliament extended the jurisdiction of the court-martial in England.<sup>86</sup> By 1803, Parliament gave a statutory basis to the Articles of War, providing that both the Articles and the Mutiny Act applied in England and abroad.<sup>87</sup>

The Mutiny Act was significant in several respects. First, it provided for courts-martial to adjudge the death penalty in England under certain circumstances. Second, it demonstrated a concern for the composition of the court-martial panel in death penalty cases, requiring the concurrence of at least nine of thirteen officers present. Third, the Act neither superseded

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79. KING JAMES II, ENGLISH MILITARY DISCIPLINE (1686), *extract reprinted in* WINTHROP, *supra* note 5, at 919.

80. *See* WINTHROP, *supra* note 5, at 19; *see also* Schlueter, *The Court-Martial*, *supra* note 39, at 142-43.

81. WINTHROP, *supra* note 5, at 19.

82. *Id.* at 20.

83. Schlueter, *The Court-Martial*, *supra* note 39, at 143; *see also* WINTHROP, *supra* note 5, at 20.

84. WINTHROP, *supra* note 5, at 20. During its nearly two-hundred year history, there were only two years and ten months, from 1698 to 1701, when the Act was not renewed. *Id.* at 20 n.22.

85. *Id.*

86. Schlueter, *The Court-Martial*, *supra* note 39, at 143.

87. *Id.*; *see also* WINTHROP, *supra* note 5, at 20.

the Articles of War nor abrogated the prerogative of the sovereign to create them.<sup>88</sup>

*c. The 1765 Articles of War: Direct Ancestor of the American System*

When war broke out between the American colonists and their British masters in 1775, the British were operating under the 1765 version of the Articles of War.<sup>89</sup> This version eventually became the template for military justice in the Continental Army.

The British Articles of War formed a precise code<sup>90</sup> that governed the details of everyday life in the Army<sup>91</sup> and provided a sound method for trying offenses at courts-martial. The Articles of War established two levels

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88. Schlueter, *The Court-Martial*, *supra* note 39, at 143.

89. See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 298 n.41 (1957) (noting that the 1765 version of the Articles of War was in force at the outbreak of the Revolutionary War); see also British Articles of War of 1765 [hereinafter 1765 Articles], reprinted in WINTHROP, *supra* note 5, at 931 (Winthrop includes a parenthetical explanation that this version of the Articles of War was in place at the outset of the Revolutionary War). But see Schlueter, *The Court-Martial*, *supra* note 39, at 145 (stating that a 1774 version of the Articles of War was in place at the outset of the war).

90. Speaking of the British Articles of War throughout the ages, a distinguished British jurist wrote:

These statutes are very remarkable. They form an elaborate code, minute in its details to a degree that might serve as a model to anyone drawing up a code of criminal law. . . . [A]nyone who has taken the trouble to look into the Articles of War by which the Army is governed must, I think, do those who framed them the justice to say that they are most elaborate and precise.

Cockburn L.C.J., *quoted in* Stuart-Smith, *supra* note 69, at 27.

91. See, e.g., 1765 Articles, *supra* note 89, § I, art. I (requiring all officers and soldiers to attend church services), § II, art. V (forbidding officers or soldiers from striking their superiors or disobeying orders, on pain of death or other punishment as directed by a court-martial), § IX, art. III (requiring officers to issue a public proclamation that the inhabitants of towns or villages where troops were quartered should not suffer noncommissioned officers or soldiers "to contract Debts beyond what their daily Subsistence will answer" or the debts would not be discharged).

of court-martial, the general court-martial<sup>92</sup> and the regimental court-martial.<sup>93</sup>

The general court-martial was convened by “the Commander in Chief or Governor of the Garrison”<sup>94</sup> and consisted of no less than thirteen commissioned officers.<sup>95</sup> In a change from the earlier tribunals under the Code of Gustavus Adolphus and the post-Court of Chivalry courts-martial,<sup>96</sup> the convening authority was no longer permitted to sit on the court as its president.<sup>97</sup> In courts-martial held in Great Britain and Ireland, the president of a general court-martial had to be a field grade officer.<sup>98</sup> Overseas, if “a Field Officer cannot be had,” the next officer in seniority to the commander, but no lower than a captain, could serve as the president.<sup>99</sup>

There were further limitations on panel composition in a general court-martial. A field grade officer could not be tried by anyone under the rank of captain.<sup>100</sup> Servicemen were entitled to be tried by members of their own branch of service for purely internal disputes or breaches of discipline.<sup>101</sup> Presumably, this provision recognized the principle that officers belonging to the same branch of service as the offender would have special insight or expertise that would lend a sense of context to the court-martial.

For cases involving disputes between members of the Horse Guards and the Foot Guards, the court-martial would be composed equally of officers belonging to both Corps, the presidency of the court-martial rotating between the Corps by turns.<sup>102</sup> This provision helped ensure, at least

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92. *Id.* § XV, arts. I-II.

93. *Id.* § XV, art. XII.

94. *Id.* § XV, arts. I-II; *cf.* UCMJ art. 22 (2002) (setting out the requirements for convening a general court-martial).

95. 1765 Articles, *supra* note 89, § XV, arts. I-II; *cf.* UCMJ art. 16 (establishing that a general court-martial with members must consist of a military judge and at least five members).

96. *See supra* notes 60-62 and accompanying text.

97. 1765 Articles, *supra* note 89, § XV, arts. I-II (stating that the court-martial president could not be either the commander in chief or governor of the garrison where the offender was tried).

98. *Id.* § XV, art. I.

99. *Id.* § XV, art. II. This is a significant provision in its tacit recognition that operational realities could trump the otherwise rigid panel composition requirements of the Articles of War.

100. *Id.* § XV, art. IX; *cf.* UCMJ, art. 25(d)(1) (“When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.”).

nominally, that there was no service-connected bias on the court; an infantryman who struck a cavalryman, for example, would never be tried by a court consisting entirely of either infantrymen (who might be too lenient) or cavalrymen (who might be too harsh).

The regimental court-martial, being a smaller court of more limited jurisdictional concern,<sup>103</sup> had fewer requirements. The regimental court-martial was composed of five officers, “excepting in Cases where that Number [could not] conveniently be assembled,” in which case three would suffice. The court was convened by the regimental commanding officer, who was prohibited from serving on the court-martial himself.<sup>104</sup>

Other than rank and branch-of-service requirements, there were no other limits on the discretion of the court-martial convening authority in selecting panel members. As for the members themselves, they took an oath, as had their predecessors under the Gustavus Adolphus Code, to render fair and impartial justice:

I [Name] do swear, that I will duly administer Justice according to the Rules and Articles for the better Government of His Majesty’s Forces . . . without Partiality, Favour, or Affection; and if any doubt shall arise, which is not explained by the said Articles or Act of Parliament, according to my Conscience, the best of my Understanding, and the Custom of War in like cases.<sup>105</sup>

The British system of military justice developed considerably over the seven hundred years of its existence.<sup>106</sup> Drawing on civil law sources

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101. 1765 Articles, *supra* note 89, § XV, arts. III-IV. Although this type of provision is no longer a part of American court-martial practice, it does remain in Army administrative separation procedures for officers and enlisted personnel. *See, e.g.*, U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL SEPARATIONS para. 2-7b(2) (1 Nov. 2000) (guaranteeing that in separation boards for Reserve Component soldiers, at least one board member will be from a Reserve Component); U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-7 (3 Feb. 2003) (guaranteeing that Reserve Component officers will have at least one Reserve Component board member and also permitting, if reasonably available, special branch officers to have a member of their branch on the board).

102. 1765 Articles, *supra* note 89, art. IV.

103. The regimental court concerned itself with “inflicting corporal Punishments for small Offences.” *Id.* § XV, art. XII.

104. *Id.* § XV, art. XIII.

105. *Id.* § XV, art. VI.

106. *See* Schlueter, *supra* note 39, at 144.

dating back to the Roman Empire, it created a tradition of military due process in which an accused had the right to receive notice, present a defense, and argue his cause.<sup>107</sup> These rights developed as a system parallel to, and almost entirely outside of, the common law.<sup>108</sup> The court itself evolved from one in which the sovereign or convening authority selected the members and served on the court, to one in which the convening authority was barred from court membership and had certain rank and branch of service restrictions placed on him when appointing court members.

Although the British court-martial drew its authority from the sovereign, there had been a struggle between the executive and Parliament with respect to the power of courts-martial over the civilian populace.<sup>109</sup> By first denying capital punishment to the executive, then sanctioning it in a limited fashion through the annual Mutiny Acts, Parliament exerted some civilian control over military justice, giving it “a blessing, of sorts, from the populace,”<sup>110</sup> while ensuring that the span of its jurisdiction was limited. Nevertheless, the Articles of War remained within the prerogative of the executive.

When the United States declared independence and fought the Revolutionary War, “it had a ready-made military justice system.”<sup>111</sup> It is, perhaps, ironic that even as the fledgling nation fought to free itself from the British political system, it recognized the intrinsic value of the British military justice system in providing good order and discipline to its own armed forces.

### 3. *Pre-Constitutional American Courts-Martial*

The Continental Congress did not wait long before legislatively implementing a code to govern the Continental Army. Significantly, military justice was not left to the executive; in the American system, the legislature undertook the government of the armed forces from the beginning. On 14 June 1775, before it had even appointed a Commander in Chief for the Army, Congress appointed a committee to prepare rules and regulations for the government of the Army.<sup>112</sup> The committee reported a set of

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107. *Id.*

108. *Cf.* Sherman, *supra* note 54, at 3 (noting that the development of courts-martial occurred separately from the development of the common law).

109. *See supra* notes 73-74 and accompanying text.

110. Schlueter, *The Court-Martial*, *supra* note 39, at 144.

111. Rosen, *supra* note 40, at 18.

Articles to Congress on 28 June; on 30 June, Congress adopted the code.<sup>113</sup> Many of these articles had been copied directly from the Articles of War that had been adopted by the State of Massachusetts for the governance of its troops;<sup>114</sup> in turn, the Massachusetts articles had adapted from the British Articles of War, although the Massachusetts articles were not as complete.<sup>115</sup>

Within a year, George Washington asked his Judge Advocate General to inform Congress that the 1775 Articles were in need of revision because they were insufficient.<sup>116</sup> John Adams drafted the new articles with the agreement of his fellow committee member, Thomas Jefferson; Congress adopted them on 20 September 1776.<sup>117</sup> The new set of articles was more complete than the 1775 Articles,<sup>118</sup> closely resembled the British Articles of War, and followed the same format and arrangement as the British Articles.<sup>119</sup> John Adams believed that the Articles of War “laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans, and a rivalry with the best troops of France.”<sup>120</sup>

Both the general and regimental courts-martial were copies of their British counterparts. A general court-martial panel consisted of thirteen commissioned officers. The president could not be the convening authority and had to be a field grade officer;<sup>121</sup> however, unlike the 1765 British Articles, there was no “military exigency” exception permitting captains as court-martial presidents.<sup>122</sup> Field grade officers could not be tried by anyone lower in rank than a captain.<sup>123</sup> When soldiers in a dispute belonged

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112. Henderson, *supra* note 89, at 297.

113. WINTHROP, *supra* note 5, at 21.

114. *Id.* at 22.

115. *See id.* The 1765 British Articles, for example, consisted of twenty sections and a total of 112 articles. *See generally* 1765 Articles, *supra* note 89. In contrast, the Massachusetts Articles consisted of fifty-two articles that were not arranged by sections. *See* The Massachusetts Articles of 1775, *reprinted in* WINTHROP, *supra* note 5, at 947.

116. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 670-71 n.2 (Worthington C. Ford et al. eds., 1904-1937) [hereinafter JOURNALS]. The Congress did not indicate in what respect General Washington and his Judge Advocate General considered the 1775 Articles of War insufficient. *See id.*; *see also* Henderson, *supra* note 89, at 298 (citing the *Journals*).

117. *See* JOURNALS, *supra* note 116, at 670-71 n.2. Adams wrote that he and Jefferson reported the British Articles in their entirety, and that they were “finally carried” by Congress. *Id.* *See also* Henderson, *supra* note 89, at 298.

118. The 1776 Articles consisted of eighteen sections and 101 Articles. *See generally* American Articles of War of 1776, § XIV, art. I [hereinafter 1776 Articles], *reprinted in* WINTHROP, *supra* note 5, at 961.

to different corps, the court-martial was required to be composed equally of members of both corps, with a rotating presidency between the corps.<sup>124</sup>

The regimental court-martial was also nearly identical to its British counterpart. It consisted of five officers, unless that number could not conveniently be assembled, in which case three would do. The regimental commander—the convening authority—could not be a member of the court-martial.<sup>125</sup> In addition, the court members took an oath that did not differ appreciably from that in the British Articles of War, promising to “duly administer justice . . . without partiality, favor, or affection,” and to

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119. WINTHROP, *supra* note 5, at 22. The adoption of the 1776 Articles of War has engendered some controversy. Brigadier General Samuel T. Ansell, in a 1919 article, stated that the American code of military justice was “thoroughly archaic,” a “vicious anachronism among our own institutions,” that came to us through “a witless adoption” from the British system. Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. (1919), *reprinted in* Bicentennial Issue, MIL. L. REV. 53, 67 (1975). In support of those conclusions, Ansell quoted John Adams, who reported the 1776 revisions to Congress:

There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British: for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis \*\*\*\*. So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

*Id.* at 55-56 (quoting 3 JOHN ADAMS, HISTORY OF THE ADOPTION OF THE BRITISH ARTICLES OF 1774 BY THE CONTINENTAL CONGRESS: LIFE AND WORKS OF JOHN ADAMS 68-82 (n.d.)).

120. JOURNALS, *supra* note 116, at 671 n.2. Interestingly, this sentence is part of the material that General Ansell omitted when quoting the same letter in his 1919 *Cornell Law Quarterly* article. Perhaps it did not fit his theory of a “witless adoption” of a “vicious anachronism.” See Ansell, *supra* note 119, at 67.

121. 1776 Articles, *supra* note 118, § XIV, art. I.

122. See *supra* note 99 and accompanying text.

123. 1776 Articles, *supra* note 118, § XIV, art. 7.

124. *Id.* § XIV, art. 9.

125. *Id.* § XIV, art. 11.

use their “conscience, the best of [their] understanding, and the custom of war in like cases.”<sup>126</sup>

The 1776 Articles remained in place for ten years before Congress made revisions to reflect the realities of military life in America. In an army that relied on small, independent detachments, it was not always possible to comply with the strict size requirements for courts-martial mandated by the 1776 Articles.<sup>127</sup> The minimum size of a court-martial panel shrunk dramatically, from thirteen to five.<sup>128</sup> The 1786 Articles provided that no officer could be tried by anything less than a general court-martial. The restriction against field grade officers being tried by anyone of a lower rank than captain disappeared, replaced by the aspirational requirement that “[n]o officer shall be tried by . . . officers of an inferior rank if it can be avoided.”<sup>129</sup> Regimental court-martial panels were reduced to three. In addition, a new category of court, the garrison court, was created, also consisting of a panel of three. The garrison court applied to all “garrisons, forts, barracks, or other place[s]” where the troops came from different corps.<sup>130</sup> The changes to panel size remain a part of the U.S. system to this day.<sup>131</sup>

The pre-constitutional American Articles of War drew heavily on the British Articles in both form and substance, but even before the Constitutional Convention, the American system had broken away from its British counterpart in significant ways. First, the American Articles of War, although borrowed almost directly from the British, were a legislative enactment and not an executive order. Second, Congress demonstrated its

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126. *Id.* § XIV, art. 3.

127. American Articles of 1786, reprinted in WINTHROP, *supra* note 5, at 972. In the preamble to the revision, Congress noted that

crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service.

*Id.* pmbl.

128. *Id.* art. 1.

129. *Id.* art. 11.

130. *Id.* art. 3.

131. See UCMJ art. 16 (2002) (establishing the size of a general court-martial panel as not less than five members and a special court-martial panel as not less than three members).

flexibility and willingness to change the Articles as necessary. When the 1775 Articles proved inadequate, Congress acceded to a request from the commanding general of the Continental Army, George Washington, and changed them, resulting in the 1776 Articles. Ten years later, Congress evinced a willingness to revise the articles to reflect the reality of a small military that operated from a number of small, isolated detachments and garrisons. Independence having been obtained, the stage was set for the Framers to create a “more perfect Union”<sup>132</sup> and to assign the military its proper place within it.

#### B. Constitutional Framework for the Government of the Military: An American Innovation

The Founding Fathers were well aware of the power struggle that had existed between Parliament and the King regarding the powers of the military. Likewise, many of the Framers were combat veterans who had served in the Continental Army and understood the demands of military life and the need for a well-disciplined fighting force. Their solution for the government of the armed forces was a classic balancing of constitutional interests and powers. Through a combination of structural grants of power and legislation, they assured that Congress—with its responsiveness to the population, its fact-finding ability, and its collective deliberative processes—would provide for the government of the armed forces.

##### *1. The Articles of Confederation and Legislative Government of the Armed Forces*

As previously discussed, one of the first acts of the Continental Congress was to provide rules and regulations, appointing a committee to prepare such rules on 14 June 1775.<sup>133</sup> The next day, Congress unanimously elected George Washington to be Commander in Chief of the Army.<sup>134</sup> George Washington’s commission as Commander in Chief required him to ensure “strict discipline and order to be observed in the army . . . and . . .

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132. U.S. CONST. pmb1.

133. See Henderson, *supra* note 89, at 298.

134. *Id.*

to regulate [his] conduct, in every respect, by the rules and discipline of war, (as herewith given [him]) . . . .”<sup>135</sup>

In 1777, the Articles of Confederation were drafted. The Articles themselves would prove defective in forming a central government with sufficient authority to bind together a nation.<sup>136</sup> Nevertheless, the Articles formalized the powers that Congress had already exercised with respect to the military. Article IX granted Congress the “exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces, and directing their operations.”<sup>137</sup>

Article IX had a substantive impact on history. The Continental Congress was heavily involved in the day-to-day operations of the Revolutionary War and, from time to time, directed that certain members of the Continental Army and Navy be tried by court-martial. Problems with desertion from the regular and militia forces required Congress continually to focus its attention on disciplinary matters.<sup>138</sup> By the end of the war, it could truly be said that the “leaders and participants in the American Revolution were no strangers to the articles of war and the court-martial.”<sup>139</sup>

## 2. *The Constitutional Balance for Government of the Armed Forces*

One of the great defects of the Articles of Confederation was their failure to provide for the separate functions of the three basic branches of government—executive, legislative, and judicial.<sup>140</sup> The Constitutional Convention of 1787 set out to remedy this problem, creating a government in which the separate branches of power served as a check and balance on each other.<sup>141</sup> Principles of separation of powers also applied to the military. In arranging for the command, control, funding, and government of the armed forces, the Framers vested power in the executive and legislative

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135. 2 JOURNALS OF THE CONTINENTAL CONGRESS 85, 96 (1775), *quoted in* Henderson, *supra* note 89, at 298.

136. *See generally* RALPH MITCHELL, CONGRESSIONAL QUARTERLY, CQ’S GUIDE TO THE U.S. CONSTITUTION 5-7 (1986).

137. U.S. ARTS. OF CONFED. art. IX, para. 4 (1777), *quoted in* Henderson, *supra* note 89, at 298.

138. Eugene M. Van Loan III, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 383 (1971-1972).

139. *Id.* at 384.

140. *See* MITCHELL, *supra* note 136, at 14.

141. *Id.*

branches, but left the judiciary with only a collateral role in governing the armed forces.<sup>142</sup>

The Constitution vested overall command of the armed forces in the President in Article II: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.”<sup>143</sup> The President did not, however, have plenary power over the armed forces; significant functions were delegated to the legislative branch.<sup>144</sup> Article I granted Congress the power “To make Rules for the Government and Regulation of the land and naval Forces.”<sup>145</sup> This provision was added, without debate, directly to the Constitution from the existing Articles of Confederation<sup>146</sup> and indicates an unbroken link of legislative control over the government of the armed forces from the beginnings of the republic.

By distributing power over the armed forces between the legislative and executive branches, the Framers nicely “avoided much of the political-military power struggle which typified so much of the early history of the British court-martial system.”<sup>147</sup> They made it clear that while overall command of the military rested with the executive, the military would be governed and regulated according to the law handed down by the legislative branch. Thus, government of the armed forces would always reflect the will of the people as expressed through their representatives in Congress.

Following ratification of the Constitution in 1789, the First Congress undertook legislative action to provide rules for the government and regulation of the armed forces. By an enactment of 29 September 1789, the

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142. *See generally* U.S. CONST.

143. *Id.* art. II, § 2, cl. 1.

144. *See, e.g., id.* art. I, § 8 (granting Congress the power “[t]o raise and support Armies, . . . [t]o provide and maintain a Navy[, t]o call[] forth the Militia to . . . suppress Insurrections and repel Invasions[, t]o provide for organizing . . . and disciplining the Militia, . . . and to declare War”).

145. *Id.* art. I, § 8, cl. 14.

146. Van Loan, *supra* note 138, at 384.

147. Schlueter, *The Court-Martial*, *supra* note 39, at 149.

Congress expressly adopted the Articles of War that were already in force to govern the Army.<sup>148</sup> Thus, it can fairly be said that

Congress did not originally create the court-martial, but, by the operation of the Act . . . , continued it in existence as previously established. Thus, as already indicated, this court is perceived to be in fact older than the Constitution, and therefore older than any court of the United States instituted or authorized by that instrument.<sup>149</sup>

The age and history of courts-martial in the United States, as well as the customs and traditions pertaining thereto, are of no small significance in weighing challenges to the practice of command control over the appointment of court-martial members.

Having established the historical roots of the court-martial, its place in pre-constitutional American history, and its firm basis in the legislative branch of government, this article now turns to congressional oversight of the practice of discretionary command appointment of court-martial panel members.

### C. Congressional Oversight of Panel-Member Selection Process

In over two hundred and twenty-five years of congressional control over the court-martial system, the practice of discretionary command appointment of court-martial members—one of the salient features of military justice—has survived every attack. This section discusses congressional management of the court-member appointment process from the 1786 Articles of War to the present day. Over the years, Congress has statutorily limited the discretion of the convening authority and created a justice system that seeks to balance the legitimate needs of the military with the demands of due process.

#### *1. 1789 to 1916: A Period of Limited Oversight*

Congress revised the Articles of War in 1806, 1874, and 1916, but by and large the substantive laws and procedural rules of military justice

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148. WINTHROP, *supra* note 5, at 23.

149. *See id.* at 47-48.

changed very little from the Articles of War passed by the Continental Congress in 1775 and adopted by Congress in 1789.<sup>150</sup> Nevertheless, Congress did exercise oversight over the process, making some changes to the system to reflect the needs of the service.

Congress made few substantive changes to court-martial composition in the 1806 Articles of War. The 1806 Articles, however, did contain a provision that officers of the Marine Corps and officers of the Army,<sup>151</sup> “when convenient and necessary to the public service,” should be associated with each other for the purposes of trying courts-martial, and “the orders of the senior officer of either corps who may be present and duly authorized, shall be received and obeyed.”<sup>152</sup> The 1806 Articles also granted the accused the right to challenge a member of the court, and the court was bound, “after due deliberation, [to] determine the relevancy or validity, and decide

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150. Sherman, *supra* note 54, at 10. Sherman notes that although the Army and Navy justice systems differed at times in terminology, substantive law, and procedure, they each shared the following general characteristics: (1) Each contained a statement of crimes and punishments; (2) Each began with preferral of charges, and by the late nineteenth century, each required a nominal pretrial investigation; (3) The commander made the determination of whether to have a court-martial, appointed the court, oversaw the administration of the trial, and reviewed the decision and sentence; (4) The commander appointed court members from his command, with virtually no limits on his discretion; (5) There was no judge, so the court carried out its own judicial functions; (6) There was no right to defense counsel, although a non-lawyer officer was often appointed as a defense counsel in general courts-martial; (7) The court-martial tended to resemble an administrative proceeding more than a judicial proceeding in a court; and (8) The convening authority was also the final review authority post-trial, except in cases in which the sentence involved dismissal of an officer or death, or cases involving generals, in which case the sentence could not be executed without presidential confirmation. *Id.* at 10-14.

151. Winthrop explains that prior to legislation enacted in 1834, the Marine Corps occupied an undefined position. In 1834, the Marine Corps was assimilated to the Army with respect to rank, organization, discipline, and pay, but was permanently attached to the Navy for jurisdictional and disciplinary purposes. Winthrop cites occasions in which the Marines were detached for service with the Army, including considerable periods during the war in Mexico, and the taking of Fort Fisher during the Civil War. Given the potential for Marines to serve with the Army, it was deemed expedient to permit Marines and Army personnel to serve on courts-martial together. He also relates a case in which a Marine lieutenant colonel was court-martialed by the Army, and despite a holding by the Attorney General that the Marine could legally be tried by a court consisting entirely of Army officers, it was deemed prudent to put two Marines on the court-martial. *See* WINTHROP, *supra* note 5, at 74-75.

152. American Articles of War of 1806, art. 68 [hereinafter 1806 Articles], *reprinted in* WINTHROP, *supra* note 5, at 976. *Cf. supra* note 102 and accompanying text (discussing the British provision which provided that in disputes between members of the infantry and cavalry, the accused was entitled to equal representation by each on his court-martial panel).

accordingly.”<sup>153</sup> The right to challenge a member of the court individually had not previously existed.

The 1874 Articles added provisions pertaining to the authority to convene courts-martial<sup>154</sup> and created a new type of court-martial, the field officer court. In time of war, every regiment would detail a field officer as a one-man court to handle offenses by soldiers in the regiment. No regimental or garrison court-martial could be held when a field officer court could be convened.<sup>155</sup> The 1874 Articles retained the provision permitting Army officers and Marine Corps officers detached to Army service to serve together on courts-martial,<sup>156</sup> but added a provision that Regular Army officers would not otherwise be competent to sit on courts-martial to try the officers or soldiers of another force.<sup>157</sup>

The 1916 changes were more sweeping. Congress provided general, special, and summary courts-martial, the three forms of courts-martial still in force today.<sup>158</sup> In addition, Congress revised the requirements to convene the different types of courts-martial.<sup>159</sup> As in the past, all Army officers and Marine officers detached for Army service were eligible to serve

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153. 1806 Articles, *supra* note 152, art. 71.

154. *See* American Articles of War of 1874, arts. 72 (granting general court-martial convening authority to the commander of an army, Territorial Division, or department), 73 (granting general court-martial convening authority to commanders of divisions and separate brigades), *reprinted in* WINTHROP, *supra* note 5, at 986.

155. *Id.* art. 80.

156. *Id.* art. 78.

157. *Id.* art. 77.

158. American Articles of War of 1916, art. 3 [hereinafter 1916 Articles], *in* Army Appropriations Act of 1916, Pub. L. No. 64-242, § 3, 39 Stat. 619, 650-70. General courts-martial were to consist of between five and thirteen officers, special courts of three to five officers, and summary courts of one officer. *See id.* arts. 5-7. Compare today's UCMJ, which classifies the modern courts-martial and establishes their membership as follows: General courts-martial, a military judge alone or at least five members and a military judge; special courts-martial, a military judge alone, military judge with three members, or three members alone; summary courts-martial, one summary court officer. *See* UCMJ art. 16 (2002).

159. *See* 1916 Articles, *supra* note 158, arts. 8-10. General courts-martial could be convened by separate brigade or district commanders and higher commanders, including the President; special courts-martial could be convened by the commander of a detached battalion or other command; and summary courts-martial could be convened by the commander of a detached company or other command. *See id.*; *cf.* UCMJ arts. 22-24 (continuing virtually the same system of court-martial convening authorities).

on court-martial panels.<sup>160</sup> Otherwise, there were no limitations on the convening authority's discretion in selecting panel members.

*2. Post-World-War I Revisions: Introduction of Statutory Selection Criteria*

The 1916 Articles "did not wholly stand the testing fires"<sup>161</sup> of World War I. The massive mobilizations of the war brought large numbers of soldiers and officers into the Army who had little experience with military justice. The officers, in particular, were prone as commanders to resort too readily to courts-martial; and as panel members they were prone to avoid responsibility by giving severe sentences accompanied with recommendations for clemency.<sup>162</sup> When the troops returned home, they brought with them stories "of tyrannical oppression, arrant miscarriages of justice, and a complete absence of any means whereby the wronged individual could obtain recourse."<sup>163</sup> The public was outraged, and for the first time in U.S. history, there was a public movement to civilianize military law.<sup>164</sup>

The controversy spawned the famous Ansell-Crowder dispute. Major General Enoch Crowder, The Judge Advocate General, weighed in on behalf of the status quo. Brigadier General Samuel T. Ansell, Acting The Judge Advocate General, espoused the view that the military justice system was un-American and needed to be changed.<sup>165</sup> Ansell sought a number of changes, including: (1) an independent military judge who would select the court members; (2) the right of the accused to have a portion of the panel chosen from his own rank; (3) definite limits on sentences; (4)

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160. 1916 Articles, *supra* note 158, art. 4.

161. Schlueter, *The Court-Martial*, *supra* note 39, at 157.

162. *See* Young, *supra* note 25, at 100.

163. Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice?* 24 N.Y.U. L.Q. REV. 263, 264 (1949). The real irony of the movement for reform is that many of the abuses were likely committed not by career officers with a sound understanding of military justice and discipline, but by newly anointed civilian officers whose mistaken beliefs about military justice turned them into martinets.

164. Sherman, *supra* note 54, at 5.

165. *See* Farmer & Wels, *supra* note 163, at 264.

mandatory and binding pretrial investigations; (5) right to legal counsel; and (6) a civilian court of appeals.<sup>166</sup>

After demobilization, the civilianization movement lost some of its momentum, and what began as an overhaul of the military justice system ended as merely a revision.<sup>167</sup> Congress enacted a new set of Articles of War on 4 June 1920.<sup>168</sup> The new articles permitted enlisted men to prefer charges,<sup>169</sup> required an impartial investigation prior to referring charges to trial,<sup>170</sup> provided for a law member to serve on courts-martial,<sup>171</sup> guaranteed counsel for the accused,<sup>172</sup> established the appointment of a judge advocate to serve as a prosecuting attorney,<sup>173</sup> and set up a system to review courts-martial.<sup>174</sup> In addition, both the prosecution and the defense were permitted one peremptory challenge of anyone except the law member.<sup>175</sup>

For the first time, Congress established a set of personal criteria, as opposed to criteria of rank or branch-of-service, that the convening authority was required to use before appointing panel members:

When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.<sup>176</sup>

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166. Sherman, *supra* note 54, at 6.

167. Young, *supra* note 25, at 100.

168. 1920 Articles of War [hereinafter 1920 Articles], in Pub. L. No. 66-242, ch. II, 41 Stat. 759, 787-812 (1920). None of these changes affected the Articles for the Government of the Navy. See Farmer & Wels, *supra* note 163, at 264.

169. See 1920 Articles, *supra* note 168, art. 70 (providing that “[c]harges and specifications must be signed by a person subject to military law”).

170. *Id.*

171. *Id.* art. 8. A law member performed duties analogous to those of a modern-day military judge.

172. The 1920 Articles gave an accused the right to be represented by either civilian counsel at his own expense or by military counsel if reasonably available. There was not, however, a requirement that the military counsel be an attorney. See *id.* art. 17.

173. *Id.*

174. See *id.* art. 50 1/2.

175. *Id.* art. 18.

These criteria were adopted at the recommendation of Major General Crowder and the War Department.<sup>177</sup> One can argue that they represented a compromise between Ansell's proposal that an independent military judge select panel members and the historic discretionary role of the commander in choosing his own court members. Whether they were effective would remain to be seen.

3. *World War II and the Uniform Code of Military Justice: New Statutory Limitations on Convening Authority Discretion*

During World War II, the armed services conducted nearly two million courts-martial.<sup>178</sup> There had been over one hundred executions, and at war's end, some forty-five thousand service members were still incarcerated.<sup>179</sup> Some viewed the system as "an instrument of oppression by which officers fortify low-caliber leadership."<sup>180</sup> Concerns about sentence disparity, harsh treatment, and unlawful command influence over the court-martial system produced a strong reform movement that eventually resulted in the Uniform Code of Military Justice.

A post-war clemency board convened by the War Department to review the sentences of service members still in confinement remitted or reduced the sentence in over 85% of the twenty-seven thousand cases it reviewed.<sup>181</sup> Secretary of War Patterson appointed an advisory commission to examine the system. The Vanderbilt Committee, as it was known, held full hearings in Washington, D.C, and regional public hearings in New York City, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle.<sup>182</sup> It did not limit its fact-finding to "the ranks of the malcontent,"<sup>183</sup> but included general officers, enlisted men, volunteer witnesses, the Secretary and Undersecretary of the

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176. *Id.* art. 4. Compare this to the modern-day standard, in which the convening authority must consider "age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2) (2002).

177. Lamb, *supra* note 25, at 120.

178. Compare Sherman, *supra* note 54, at 28 (citing a figure of 1.7 million), with Lamb, *supra* note 25, at 120 (stating that about two million courts-martial were conducted).

179. Sherman, *supra* note 54, at 27.

180. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. REV. 55, 60 (1975), quoted in Young, *supra* note 25, at 101.

181. Sherman, *supra* note 54, at 29.

182. Farmer & Wels, *supra* note 163, at 265-66.

183. *Id.* at 266.

Army, the Commander of Army Ground Forces, and both The Judge Advocate General and The Assistant Judge Advocate General. The Committee found that while the innocent were rarely punished and the guilty rarely set free,<sup>184</sup> there was a serious problem with command domination of the court-martial system.<sup>185</sup> Committees sponsored by the Department of the Navy reached similar conclusions.<sup>186</sup>

Reform took place in stages. For the Army, Congress passed the Elston Act in 1948.<sup>187</sup> This Act created an independent Judge Advocate General's Corps, with a separate promotion list, its own assignment authority, and the guaranteed right for staff judge advocates to communicate to higher echelon staff judge advocates within technical channels.<sup>188</sup> The Elston Act also made changes to court-martial panel composition. For the first time, an enlisted accused was permitted to request trial by a panel consisting of at least one-third enlisted personnel.<sup>189</sup> The convening authority continued to exercise the discretionary authority to appoint court-martial panel members. In an attempt to solve the problem of unlawful command influence, Congress amended Article of War 88 to prohibit the convening authority and other commanders from censuring, reprimanding,

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184. *Id.*

185. *See* Sherman, *supra* note 54, at 31. In fact, the Committee found that in many instances, the convening authority who appointed the court made a deliberate attempt to influence its decisions. Although not every commander participated in this practice, "its prevalence was not denied and indeed in some instances was freely admitted." REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 6-7 (1946), *quoted in* Farmer & Wels, *supra* note 163, at 268.

186. Farmer & Wels, *supra* note 163, at 266.

187. The Elston Act is the popular name for the portion of the Selective Service Act of 1948 that amended the Articles of War. *See* Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-246, 62 Stat. 604, 627-44 [hereinafter Elston Act].

188. *See id.* §§ 246-249; *see also* Farmer & Wels, *supra* note 163, at 270.

189. Elston Act § 203 (amending Article 4 of the Articles of War to grant an enlisted accused the right to have at least one-third of a court-martial panel comprised of enlisted personnel at his written request).

manding, admonishing, coercing, or unlawfully influencing any member in reaching the findings or sentence in any case.<sup>190</sup>

The Elston Act was short-lived. It had no effect on the Navy or Marine Corps, and its applicability to the Air Force, which had become an independent service in 1947, was unclear.<sup>191</sup> In addition, it fell far short of many of the reforms that various advisory bodies and independent groups had recommended. Its main defect, according to bar associations, was that it was a reform in name only because the commander continued to exercise the power to appoint the court members, the prosecutor, and defense counsel; to refer cases for trial; and to review the findings and sentences of the courts.<sup>192</sup>

Accordingly, the Eighty-First Congress set out to create a unified system of military justice that would apply to all the services, appointing a committee chaired by Harvard Law Professor Edmund Morgan to study military justice and draft appropriate legislation. The Committee made a full study of the law and practices of the different branches of service, the complaints that had been made against the structure and operation of military tribunals, the explanations and answers of service representatives to these complaints, suggestions for reform and service responses as to their practicability, and some provisions of foreign military justice systems.<sup>193</sup> According to Professor Morgan, the committee's task was to draft legislation that would ensure full protection of the rights of individuals subject to the Code without unduly interfering with either military discipline or the exercise of military functions. This would mean "complete repudiation of a system of military justice conceived of only as an instrument of command," but would also negate "a system designed to be administered as the criminal law is administered in a civilian criminal court."<sup>194</sup> Balancing all these factors, the committee produced a code that granted unprecedented

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190. *See id.* The revised Article 88 prohibited any convening authority or any other commanding officer from censuring, reprimanding, or admonishing a court-martial or any member thereof, "with respect to the findings or sentence adjudged by the court," or with respect to any other exercise by the court or its members of their judicial responsibilities. *Id.* It also prohibited any person subject to military law from attempting "to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof," on the findings or sentence of a court-martial. *Id.*

191. Young, *supra* note 25, at 121-22. *But see id.* at 102 (stating that the Elston Act applied to the Army and the Air Force).

192. Farmer & Wels, *supra* note 163, at 273.

193. Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1952-1953).

194. *Id.* at 174.

rights to service members, while still retaining command control over the appointment of court-martial panels.

Both houses of Congress conducted extensive hearings on the Uniform Code of Military Justice.<sup>195</sup> Congress was well aware of the issue of command control, having thoroughly considered testimony on all aspects of the issue. Indeed, the House Committee on Armed Services wrestled considerably with this issue during the hearings, stating in its report that “[p]erhaps the most troublesome question which we have considered is the question of command control.”<sup>196</sup> Some witnesses suggested creating a system in which an independent Judge Advocate General’s department would appoint the court from panels submitted by convening authorities.<sup>197</sup> Other witnesses pointed out that a centralized selection process presupposed the constant availability of all members of a panel and could considerably handicap a commander in the discharge of his duties.<sup>198</sup> Mr. Robert W. Smart, a member of the professional staff of the Committee, cut to the heart of the matter when he observed that no matter the system, a clever convening authority who truly wanted to influence a court would find a way to do it in such a way that no one would easily discover it. Accordingly, “so far as the law is concerned and as far as the Congress can go effectively, all it can do is to express its opposition in good plain words, as here, to such practices.”<sup>199</sup>

Ultimately, Congress found that the solution did not lie in removing from commanders the authority to convene courts-martial and appoint court members. According to the House Report,

We fully agree that such a provision [removing the commander from the process] might be desirable if it were practicable, but

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195. See generally *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. (1949) [hereinafter *House Hearings*], reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000); *Hearings Before a Subcomm. of the Senate Comm. of Armed Services on S. 857 and H.R. 4080*, 81st Cong. (1949), reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000).

196. H.R. REP. NO. 81-491, at 7 (1949), reprinted in INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000).

197. *House Hearings*, supra note 195, at 648 (prepared statement of Mr. Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association); see also *id.* at 728 (prepared statement of Mr. George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association).

198. *Id.* at 1124 (statement of Hon. John W. Kenney, Under Secretary of the Navy).

199. *Id.* at 1021.

we are of the opinion that it is not practicable. *We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace,* and regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.<sup>200</sup>

The solution, at least according to the House, was to retain the commander's traditional role in convening courts-martial and appointing panel members, while ensuring that appropriate statutory measures were put in place to provide constraints on his power.<sup>201</sup>

Nevertheless, the UCMJ made several changes in the panel member selection process. First, Article 25 made any member of an armed force eligible to sit on the court-martial of a member of another armed service.<sup>202</sup> Second, warrant officers and enlisted personnel were granted the right to serve on court-martial panels, and enlisted personnel were guaranteed a panel consisting of at least one-third enlisted members upon written request.<sup>203</sup> Third, the qualifications of court members were amended to include "age, education, training, experience, length of service, and judicial temperament."<sup>204</sup> Fourth, UCMJ Article 29, in providing that members of a general or special court-martial could not be absent after arraignment without good cause,<sup>205</sup> solved a practice that had existed in the shadowy penumbra of the Articles of War in which convening authorities

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200. H.R. REP. NO. 81-491, at 8 (emphasis added).

201. *See id.* at 7-8. The House Report listed several provisions of the UCMJ, that in the Committee's opinion, limited the power of a convening authority: the convening authority could not refer charges for trial until they had been examined for legal sufficiency by the Staff Judge Advocate; the Staff Judge Advocate would be permitted direct communication with The Judge Advocate General; all counsel at general courts-martial were required to be either lawyers or law graduates, certified by The Judge Advocate General; a law officer would play a judicial role at the court-martial, and his rulings on interlocutory questions of law would be final; the Staff Judge Advocate would have to review the record of trial for legal sufficiency before the convening authority could take action on findings or sentence; the accused would have legally qualified appellate counsel before a board of review and the Court of Military Appeals; the Court of Military Appeals, a civilian appellate court, would preside over the military justice system; and finally, it would be a court-martial offense for any person subject to the Code to influence unlawfully the action of a court-martial. *Id.*

202. Uniform Code of Military Justice of 1950, art. 25(a), Pub. L. No. 81-506 (codified as amended at 10 U.S.C. §§ 801-946) [hereinafter 1950 UCMJ] ("Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.").

could reduce or add to the membership of court-martial panels *during the trial* in an effort to influence the court.<sup>206</sup> Fifth, the UCMJ packed a punch concerning attempts to influence the court. Article 37 prohibited unlawful influence on a court by convening authorities, commanders, or anyone subject to the Code,<sup>207</sup> while Article 98 made it a punitive offense to knowingly and intentionally violate Article 37.<sup>208</sup>

The UCMJ, then, represented a legislative compromise. It was not an ideal system of justice, but given its purpose of sustaining good order and discipline within the military without unduly impairing operations, it could not be. Over the protests of many individuals, organizations, and groups, Congress retained the commander as the central figure of the military justice system, yet significantly modified his powers and added statutory checks and balances to limit outright despotism.

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203. *Id.* art. 25(b), (c)(1). Article 25 stated, in part:

(b) Any warrant officer on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be eligible to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall serve as a member of the court only if, prior to the convening of such a court, the accused personally has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies. When such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

*Id.*

204. *Id.* art. 25(d)(2). This slightly modified the previous requirements under the Articles of War to consider individuals on the basis of age, training, experience, and judicial temperament, with a preference for officers having more than two years' service. *See supra* note 176 and accompanying text.

205. 1950 UCMJ, *supra* note 202, art. 29.

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206. *See Morgan, supra* note 193, at 175.

(a) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of challenge or by order of the convening authority for good cause.

(b) Whenever a general court-martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court-martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had been previously introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

1950 UCMJ, *supra* note 202, art. 29.

207. 1950 UCMJ, *supra* note 202, art. 37. Article 37 provided:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court of any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

*Id.*

208. *Id.* art. 98. Article 98 provided:

Any person subject to this code who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after the trial of an accused;

shall be punished as a court-martial may direct.

*Id.*

4. *1950 to Present: Continued Oversight and Consistent Rejection of Efforts to Remove Convening Authority from Selection Process*

Congress has continued to exercise oversight of the court-martial system. The UCMJ experienced major revisions in 1968<sup>209</sup> and in 1983.<sup>210</sup> Neither of those revisions affected the panel member selection process.

There have been occasional legislative initiatives to change the panel member selection process, but Congress has not adopted them. In 1971, Senator Birch Bayh of Indiana introduced legislation that would have established an independent court-martial command, the Administrative Division of which would have appointed court-martial members by random selection.<sup>211</sup> Other bills were introduced at about the same time that would have reformed the panel selection system by requiring the convening authority to employ random selection,<sup>212</sup> or by requiring the military judge to select the panel using a random selection method.<sup>213</sup> Similar efforts occurred in 1973.<sup>214</sup> In 1983, the Association of the Bar of the City of New York launched a campaign to remove the convening authority from

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209. See generally Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. Under this Act, the law officer of the earlier code became a full-fledged military judge whose rulings on nearly all interlocutory matters were considered final. See *id.* § 2(9) (amending UCMJ Article 26 to create the position of military judge), 2(21) (amending UCMJ Article 51 to permit the military judge to rule on most interlocutory matters). Significantly, the accused was given the option to elect trial by military judge alone. See *id.* § 2(3) (amending UCMJ Article 16 to permit an accused to elect trial by military judge alone in general courts-martial and in special courts-martial to which a military judge had been detailed).

210. See generally Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

211. See Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9, 13 (1971). He introduced Senate Bill 1127, 92d Cong. (1971), 117 CONG. REC. 2550-66 (1971).

212. The Hatfield Bill, S. 4169, 91st Cong., § 825 (1970), cited in Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971) [hereinafter Sherman, *Congressional Proposals*].

213. The Whalen-Price Bill, H.R. 6901, 92d Cong., § 825 (1971); H.R. 2196, 92d Cong., § 825 (1971), cited in Sherman, *Congressional Proposals*, supra note 212, at 46.

214. See, e.g., Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), reprinted in Bicentennial Issue, MIL. L. REV. 579, 582 (1975) (discussing bills introduced in the Ninety-Third Congress by Senator Bayh and Representative Bennett, and by Senator Hatfield).

panel selection and substitute a system such as random selection.<sup>215</sup> None of these efforts succeeded.

The most recent congressional action relating to panel member selection was in the 1999 National Defense Authorization Act. Section 552 of the Act required the Secretary of Defense to submit a report on the method of selection of members of the armed forces to serve on courts-martial.<sup>216</sup> The Secretary was directed to examine alternatives, including random selection, to the current system of convening authority selection that would be consistent with the “best-qualified” criteria of UCMJ Article 25(d)(2), and solicit input from the JSC.<sup>217</sup>

In its report of 15 August 1999, the JSC explored a number of alternatives to the current selection system, including random nomination, random selection, a combination of random nomination and selection, expanding the source of potential court members, and using independent selection officials. The JSC concluded that the current system is most likely to obtain best-qualified members within the operational constraints of the military justice system.<sup>218</sup> Congress has taken no additional action on the matter.

History has shown that Congress has exercised firm control of the military justice system from the Revolution to the present day, before and after the enactment of the Constitution. Over the years, in response to the concerns of its constituents, Congress has made significant changes to the American military justice system. However, despite numerous reform initiatives and proposals, Congress has retained the convening authority’s

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215. Lamb, *supra* note 25, at 124-25.

216. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920.

217. *Id.* The JSC consists of representatives from each of the following officials: The Judge Advocates General of the Army, Navy, and Air Force; the Staff Judge Advocate to the Commandant of the Marine Corps; and the Chief Counsel, United States Coast Guard. The JSC’s purpose is to assist the President in fulfilling his responsibilities under the UCMJ by conducting an annual review of the *MCM* and to propose appropriate amendments to the *Manual for Courts-Martial* and the UCMJ. See generally U.S. DEP’T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (8 May 1996).

218. JSC REPORT, *supra* note 32, at 3.

discretionary powers to appoint court-martial panel members according to statutorily required subjective criteria.

#### D. The Court-Martial in Context: Legislative Courts and Statutory Due Process

The final step in evaluating the historical and constitutional background of the court-martial is to place it within its proper context as a legislative (Article I) court. Accordingly, this section first discusses the constitutional basis for legislative courts. Next, the section examines Supreme Court jurisprudence on the constitutionality of the statutory due process systems Congress created for some of the other legislative courts. Finally, the section explores the judicial deference doctrine that the Article III courts apply to issues arising within courts-martial.

##### *1. Introduction to Legislative Courts*

Article III of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>219</sup> The hallmark of these courts is the judicial independence provided by the life tenure and salary guarantees of Article III, section 1.<sup>220</sup> Article III courts include the Supreme Court, the Circuit Courts of Appeal, and the United States District Courts.<sup>221</sup>

The Article III courts, however, do not handle all the judicial business of the United States. For over two hundred years, Congress has used its enumerated powers under the Constitution in conjunction with the Necessary and Proper Clause<sup>222</sup> to create specialized tribunals,<sup>223</sup> including courts-martial,<sup>224</sup> that are free from the tenure and salary protections of

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219. U.S. CONST. art. III, § 1.

220. *See id.* Section 1 provides that the judges “shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” *Id.*

221. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5, at 43 (2d ed. 1988).

222. U.S. CONST. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

Article III.<sup>225</sup> Although these courts use the judicial process in adjudicating cases,<sup>226</sup> they do not partake of the “judicial power of the United States” within the meaning of Article III.<sup>227</sup> The Supreme Court has occasionally struggled to define the proper limits of legislative courts,<sup>228</sup> but there is no constitutional infirmity in Congress’s creation and operation of them.<sup>229</sup> In fact, there are sound pragmatic reasons for these courts—among them flexibility and ease of administration—and the Supreme Court has accorded considerable deference to Congress in “the choice of

223. Examples of these courts include the territorial courts, subject to congressional governance under Article IV of the Constitution; the District of Columbia court system, created pursuant to Congress’s Article I authority to “exercise exclusive Legislation” over the District of Columbia; the consular courts, which stemmed from Congress’s power over treaties and foreign commerce; the Tax Court, rooted in the power to “lay and collect taxes”; and, of course, the court-martial system, created pursuant to Congress’s authority to provide rules for the government of the land and naval forces. See Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 89-91 (1988). There have also been, over the years, a number of other tribunals formed for limited purposes, including the Court for China, the Court of Private Land Claims, the Choctaw & Chickasaw Citizenship Court, and the Court of Customs Appeals. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 450-58 (1929) (listing the various legislative courts).

224. See U.S. CONST. art. I, § 8, cl. 14; see also *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858) (stating that the power for Congress to provide for the trial and punishment of Army and Navy personnel “is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States”).

225. See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 235 (1990); see also 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 100.40 (3d ed. 1999).

226. See, e.g., Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1055 (1998).

227. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). In *Canter*, Chief Justice Marshall made a famous statement about the relationship of the legislative courts to the judicial power of the nation.

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress.

*Id.*

means it thought 'necessary and proper' to implement the powers explicitly delegated to it under the Constitution."<sup>230</sup>

Legislative courts play a useful role in assisting Congress to carry out its enumerated powers efficiently, particularly when the use of "full-blown 'national' tribunals, with judges enjoying life tenure and restricted to a 'judiciary' power, has seemed awkward and inappropriate in the context of meeting certain other adjudicatory needs."<sup>231</sup> Courts-martial are a prime example of a court system in which the protections, procedures, and inherent inefficiencies of the Article III courts would interfere with the military's ability to use the system effectively to help maintain good order and discipline. "Thus, from the beginning," wrote Paul Bator, a law professor at the University of Indiana, "soldiers and sailors have been tried by military tribunals administering a specialized military justice."<sup>232</sup>

## 2. *Fundamental Rights, Statutory Due Process, and the Legislative Courts*

Even when life and liberty are at stake, legislative courts are not required to grant due process rights that are intrinsic to the Article III courts.<sup>233</sup> The Supreme Court has, instead, employed an analysis that examines whether the statutory due process system of a given legislative court grants what it calls "fundamental rights." This section analyzes the

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228. See generally Stern, *supra* note 226 (reviewing legislative court doctrine, and suggesting that the text of the Constitution permits courts-martial, territorial courts, adjudication of public rights, and creation of judicial adjuncts without infringing on Article III); Bator, *supra* note 225 (discussing the Court's legislative courts' jurisprudence, criticizing it, and suggesting a framework in which Article III tribunals provide review of the legal and factual determinations of Article I courts); Saphire & Solimine, *supra* note 223 (discussing the Court's jurisprudence on the matter, and criticizing the balancing test of *Commodity Futures Trading Co. v. Schor*, 478 U.S. 833 (1986)).

229. See Saphire & Solimine, *supra* note 223, at 89.

230. *Id.*

231. Bator, *supra* note 225, at 235.

232. *Id.*

233. See, e.g., *Curry v. Sec'y of the Army*, 595 F.2d 873 (D.C. Cir. 1979) ("We agree that the system established in the UCMJ would be inconsistent with due process if instituted in the context of a civilian criminal trial.").

Supreme Court's treatment of statutory due process systems in the consular and territorial court systems.

*a. Consular Courts*

The consular courts arose from Congress's authority over treaties and commerce under Article I of the Constitution.<sup>234</sup> Under this system, American ministers and consuls were granted extensive power over U.S. citizens pursuant to U.S. treaty obligations.<sup>235</sup> Congress established a statutory system in which the minister and consuls of the United States in certain overseas locations<sup>236</sup> were vested with judicial authority and could arraign and try all citizens of the United States charged with offenses of host-country law.<sup>237</sup> The consular courts had neither grand juries nor petit juries.

The leading case on the consular courts is *In re Ross*.<sup>238</sup> The appellant, a British seaman serving on an American merchant ship in Japan, was tried for murder and sentenced to death by a consular court consisting of the consul and four associates.<sup>239</sup> The appellant filed a writ of habeas corpus in the Circuit Court for the Northern District of New York, alleging that he had been denied his Fifth Amendment right to grand jury presentment and his Sixth Amendment right to trial by petit jury. The Circuit Court denied the writ, and on appeal, the Supreme Court affirmed.<sup>240</sup>

In affirming the denial of the writ, the Court first noted the centuries-old existence of consular courts as a means by which nations could protect

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234. U.S. CONST. art. I, § 8, cl. 1; *see also* Saphire & Solimine, *supra* note 223, at 90.

235. *See* MOORE, *supra* note 225, at § 100 app.02[7].

236. Japan, China, Siam, and Madagascar. *See In re Ross*, 140 U.S. 453 (1891).

237. REVISED STATUTES OF THE UNITED STATES §§ 4083-4096 (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the Forty-Third Congress).

238. 140 U.S. 453 (1891). The appellant in *In re Ross* was represented by counsel and filed several motions with the consular court, including a motion for grand jury presentment and a motion for a trial by petit jury. All of the motions were denied. His death sentence was approved by the United States minister in Japan, but it was commuted to life in prison by the President of the United States. *Id.* at 453-61.

239. *Id.* at 453-61. This was pursuant to Revised Statute § 4106, which required a consul to sit with a panel of four for capital cases. The method of selection was a modified form of random selection, in which the associates, as they were called, were "taken by lot from a list which had previously been submitted to and approved by the minister." REVISED STATUTES, *supra* note 237, § 4106. The only requirement was that they be "[p]ersons of good repute and competent for the duty." *Id.*

240. *In re Ross*, 140 U.S. at 480.

their citizens from the hostile and alien forms of justice practiced in the “non-Christian” nations.<sup>241</sup> It held that the statutory framework for the consular courts, despite its failure to provide for grand jury presentment or trial by petit jury, did not violate the Constitution because the Constitution did not have extraterritorial application.<sup>242</sup> Finally, it examined the due process rights actually afforded to the appellant and concluded that under the consular court system, the appellant had “the benefit of all the provisions necessary to secure a fair trial before the consul and his associates”: the opportunity to examine the complaint against him, the right to confront and cross-examine the witnesses against him, and representation by counsel.<sup>243</sup>

The *In re Ross* holding that the Constitution had no extraterritorial applicability was effectively overruled in *Reid v. Covert*,<sup>244</sup> when the Court stated that *In re Ross* “rested, at least in substantial part, on a fundamental misconception” and “should be left as a relic from a different era.”<sup>245</sup> Nonetheless, the *In re Ross* analysis of what constitutes a fair trial—notice, the right of confrontation, and the assistance of counsel—has never been overruled.<sup>246</sup>

#### b. *The Territorial Courts*

Article IV of the Constitution grants Congress the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>247</sup> As part of this power, Congress has established legislative courts to handle both criminal and civil matters within the territories. The Supreme Court has upheld creation of these courts based on the perception “that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government.”<sup>248</sup> In its role as a sovereign power over the territories, Congress assumes a role similar to a state or

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241. *Id.* at 462-63.

242. *Id.* at 464.

243. *Id.* at 470.

244. 345 U.S. 1 (1957) (invalidating a statutory grant of court-martial jurisdiction over persons accompanying the armed forces overseas).

245. 345 U.S. 1, 12 (1957).

246. *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (noting that the Court has never overruled *In re Ross*).

247. U.S. CONST. art. IV, § 3.

248. *Northern Pipeline Constr. Co. v. Marathon Pipeline*, 458 U.S. 50, 64 (1982).

municipal government and is not bound by the tenure and salary restrictions of Article III. The same analysis applies to the District of Columbia, in which Congress “has entire control over the district for every purpose of government,”<sup>249</sup> including the courts.

Doctrinally, the Supreme Court has divided the territories into two types: (1) incorporated territories and the District of Columbia; and (2) unincorporated territories such as Puerto Rico and the Virgin Islands.<sup>250</sup> The extent to which due process rights apply depends on the status of the territory. In the incorporated territories and the District of Columbia, criminal defendants have no right to be tried before an independent judiciary with the tenure and salary protections of Article III.<sup>251</sup> The inhabitants of these areas are, however, entitled to grand jury presentment according to the Fifth Amendment and trial by petit jury according to the Sixth Amendment.<sup>252</sup>

The unincorporated territories are somewhat different. In a line of cases dating back to the early twentieth century, the Supreme Court has ruled that the full protections of the Constitution do not extend to these

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249. *Kendall v. United States*, 12 Pet. 524, 619 (1838).

250. *See Dorr v. United States*, 195 U.S. 138, 143 (1904). An incorporated territory is one in which the treaty of cession or agreement by which the United States acquired the territory specifically manifests an intent to incorporate the territory in the United States. An unincorporated territory, in contrast, is one in which the treaty of cession or acquisition agreement does not manifest such an intent. *See id.* At the turn of the century, the Philippines and Puerto Rico were unincorporated territories that had been obtained by a treaty of cession from Spain. *See Carlos R. Soltero, The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 6 (2001). In 1917, the United States purchased the Virgin Islands from Denmark, and those islands became an unincorporated territory. *See Joycelyn Hewlett, The Virgin Islands: Grand Jury Denied*, 35 HOW. L.J. 263, 265 (1992). The Philippines are now an independent nation, but Puerto Rico and the Virgin Islands remain unincorporated territories of the United States.

251. *See* 1 RONALD J. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 3.11 (3d ed. 1999).

252. *See Callan v. Wilson*, 127 U.S. 540, 550 (1888). In *Callan v. Wilson*, the Court ruled on a challenge to a District of Columbia law that gave original jurisdiction of certain offenses to a police court. In striking down this provision, the Court stated that there was “nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases.” *Id.* In its analysis, the Court noted that the right of trial by jury had always been interpreted to apply to the occupants of the territories and stated, “We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States.” *Id.*

areas. In *Dorr v. United States*,<sup>253</sup> the Court addressed the issue of whether Congress was constitutionally required to legislatively provide for trial by jury in the Philippines.<sup>254</sup> Relying on the Insular cases,<sup>255</sup> the Court held that because the Philippines was an unincorporated territory, the full protections of the Constitution did not apply to the inhabitants.<sup>256</sup> Congress was bound by the specific limitations imposed by the Constitution on its power, such as the prohibition against *ex post facto* laws or bills of attainder, but otherwise had only to provide fundamental rights in the unincorporated territories.<sup>257</sup> Citing prior decisions, the Court stated that trial by jury and presentment by grand jury were not fundamental rights.<sup>258</sup>

The Court then analyzed the Filipino statutory due process system, in which an accused was given the right of counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, and to confront the witnesses against him. The system also provided for compulsory process of witnesses, due process, prohibition against double jeopardy, the privilege against self-incrimination, and appellate rights. Writing for the majority, Justice Day stated, "It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings, which give full opportunity to be heard by competent tribunals before judgment can be pronounced."<sup>259</sup>

A few years later, the Court elaborated on the formula it had established in *Dorr* in another newspaper libel case, this time from Puerto Rico.

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253. 195 U.S. 138 (1904). The petitioners in *Dorr* were newspaper editors accused of committing libel in the Philippines. At trial, they demanded indictment by grand jury and trial by petit jury, both of which were denied because they were not required under Filipino law. The petitioners appealed to the Supreme Court of the Philippines and from there to the United States Supreme Court. *Id.*

254. When the Philippines came under United States control, Congress established a criminal justice system based on the civil law that had governed the Philippines under Spanish rule for several hundred years. The system did not include trial by jury. *Id.* at 145.

255. The Insular cases developed the doctrine of territorial incorporation. They were not criminal cases, but rather were challenges based on the Uniformity Clause of the Constitution, U.S. CONST. art. 1, § 8, to duties imposed on commercial goods exchanged between the territories and the United States. *Downes v. Bidwell*, 182 U.S. 244 (1901), was the most important of these cases. It held that the Uniformity Clause did not apply to the territories. It also made the distinction between incorporated and unincorporated territories and the reach of the Constitution in both. See Soltero, *supra* note 250, at 150.

256. *Dorr*, 195 U.S. at 149.

257. *Id.* at 145-48.

258. *Id.* (citations omitted).

259. *Id.* at 145-46.

In *Balzac v. People of Porto Rico* [sic],<sup>260</sup> the appellant had been tried for misdemeanor libel in a Puerto Rican court. The Puerto Rican code of criminal procedure at the time permitted jury trial for felony cases but not misdemeanor cases.<sup>261</sup> The appellant argued that the statute violated his constitutional right to trial by jury. The Court disagreed, ruling that Puerto Rico was not an incorporated territory within the meaning of its jurisprudence.<sup>262</sup> Thus, the full protections of the Constitution did not apply there as a matter of right; due process rights such as grand jury presentment or trial by petit jury could only be granted statutorily.<sup>263</sup>

The Court again applied its fundamental rights analysis from *Dorr*. It defined fundamental rights as “those . . . personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law,”<sup>264</sup> but, quoting *Dorr*, stated that trial by jury was not a fundamental right. The Court focused on Congress’s power to govern the territories under Article IV, Section 3, and the fact that even as Congress provided a Bill of Rights for the Puerto Ricans, it excluded grand and petit juries.<sup>265</sup>

The holdings in *Dorr* and *Balzac* are still valid.<sup>266</sup> While they do not apply *per se* to courts-martial, they do illustrate that the Court applies a different constitutional analysis to legislative courts than to Article III courts. Even in matters affecting life and liberty, no litigant in a legislative court

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260. 258 U.S. 298 (1921).

261. *Id.* at 302-03.

262. *Id.* at 306-07. The appellant argued that he was entitled to the full protections of the Constitution because of the Jones Act of 1917, which granted United States citizenship to residents of Puerto Rico who did not opt out within six months. The Jones Act contained a section entitled the “Bill of Rights,” which gave every one of the constitutional guarantees to the Puerto Ricans *except* indictment by grand jury and trial by petit jury. *Id.* at 306-07. The Supreme Court disagreed with the appellant’s theory. Carefully parsing the Jones Act, the Court found nothing in it to demonstrate a congressional intent to incorporate Puerto Rico into the Union. *Id.* at 307-08.

263. *Id.* By the time the case reached the Supreme Court, the Puerto Rican legislature had amended its code to statutorily permit trial by jury in misdemeanor cases. *Id.* at 303.

264. *Id.* at 312-13.

265. *See id.* at 306-07, 312.

266. *See, e.g.,* Soltero, *supra* note 250, at 4 (noting that in recent decisions, the Rehnquist Court has upheld the validity of these cases); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (favorably discussing the Insular cases and their progeny as still-valid precedent); De La Rosa v. United States, 229 F.3d 80, 87 (3d Cir. 2000) (noting that the “fundamental rights” doctrine of *Balzac* and *Dorr* still applies to Puerto Rico today).

enjoys the benefits of an independent judiciary with tenure and salary protections. Furthermore, rights such as grand jury presentment and trial by petit jury that would be constitutionally required in Article III courts, may not be required in all legislative courts. Where Congress acts pursuant to its enumerated constitutional powers and in accordance with valid congressional aims, a statutory form of due process that guarantees a fair trial and fundamental rights is sufficient.

### 3. Courts-Martial and the Military Deference Doctrine

#### a. Introduction to the Doctrine

Of all the legislative courts created by Congress, courts-martial have received the most deference from the Article III courts. Under a standard of review known as the “separate community”<sup>267</sup> or “military deference”<sup>268</sup> doctrine, the courts have proclaimed the armed forces to be a distinct subculture with unique needs, “a specialized society separate from civilian society.”<sup>269</sup> Where there is a conflict between the constitutional rights of the individual serviceman and an asserted military purpose, the courts have deferred to Congress’s ability—indeed, duty—to balance the appropriate factors and reach a necessary compromise.<sup>270</sup>

This doctrine is firmly rooted in the principle of separation of powers. The Supreme Court has stated that individual rights of service members “must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”<sup>271</sup> In furtherance of that duty,

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267. See generally James M. Hirshhorn, *The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (providing a theoretical framework and justification for the military deference doctrine).

268. See generally John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). O’Connor notes that the doctrine has developed in three stages during our country’s history. During the first stage, which lasted until the mid-1950s, virtually no meaningful constitutional review of military regulations and procedures occurred. The second stage featured an activist court that sought to curtail what it viewed as Congress’s inappropriate attempts to extend court-martial jurisdiction; the stage ended with the *O’Callahan v. Parker* decision, 395 U.S. 258 (1969), which established the service-connection test. The third stage was the development of the military deference doctrine as known today, beginning in the mid 1970s. O’Connor, *supra*.

269. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

270. *Id.*

the Constitution does not impose limits on Congress, but rather empowers it.<sup>272</sup>

The Courts defer to congressional judgment on matters of good order and discipline because the military's mission to fight and win the nation's wars is different from any other activity of the government. For the military to carry out its duties properly, it must be subordinate to the political will, and it must be internally disciplined.<sup>273</sup> The very survival of the nation is at stake. Therefore, the consequences of judicial error concerning the effect of a practice on military effectiveness are particularly serious.<sup>274</sup>

The modern service member, whether an infantryman engaged in direct combat or a rear-echelon administrative specialist, must be able to perform effectively while beyond the direct supervision of officers.<sup>275</sup> Adherence to group standards is necessary for the fulfillment of unpleasant duties that the typical member of society does not have to face.<sup>276</sup> The existence of formal disciplinary authority is critical in maintaining this

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271. *Burns v. Wilson*, 346 U.S. 137, 140 (1953). In *Burns*, the petitioners were tried separately by Air Force courts-martial and convicted of murder and rape on the island of Guam. At trial, they raised a number of issues pertaining to their treatment by Guam authorities, their confessions, and the trial procedures at the courts-martial. They exhausted their remedies through the military court system and then applied for a writ of habeas corpus in the United States District Court for the District of Columbia. *Id.* at 138. The district court denied the writ, and both the Court of Appeal and the Supreme Court affirmed. *Id.* at 137. The Supreme Court held that because Congress had established a separate justice system for the military with its own system of review, the civil courts would limit their review of a habeas corpus petition to determining whether the military courts had given fair consideration to the petitioner's claims at trial. *Id.* at 144.

272. *See* Hirshhorn, *supra* note 267, at 211.

273. *See id.* at 219-21. Hirshhorn explains that good order and discipline is particularly significant in a system that subordinates the military to civilian leadership:

As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, i.e., the will to carry out the instructions of their civilian superiors despite their own disagreement.

*Id.* at 217.

274. *Id.* at 239. The consequences of insubordination or indiscipline can be devastating to national policies. Hirshhorn cites McClellan's attempt to control Lincoln's policy on slavery by threatening that his troops would not fight for emancipation, and the 1914 action of British officers in preventing Home Rule for Ireland by threatening to resign en masse rather than fight the Ulster Protestants. *Id.* at 217.

275. *Id.* at 221.

capability. As the Supreme Court stated in *Schlesinger v. Councilman*,<sup>277</sup> “To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life.”<sup>278</sup> In other words, service members must believe that the military has the power to detect and punish resistance or noncompliance with its standards.<sup>279</sup>

In discharging its constitutional function of making rules for the government of the armed forces, Congress has balanced the laws, interests, and traditions of the military with the rights of individual service members.<sup>280</sup> Thus, the Article III courts are conscious of the consequences of judicial miscalculation concerning the effect of individual rights on military efficiency. Because the political branches have, in acting, already weighed the affected individual interests, any judicial decision that constitutionalizes the individual interests of the service member rejects the balance struck by Congress.<sup>281</sup>

*b. Application to the UCMJ's Statutory Due Process Framework*

The statutory due process system of the UCMJ is constitutionally acceptable within its context, although some of the same procedures (for example, the practice of a convening authority using subjective criteria to personally select members of the court) would be constitutionally infirm in an Article III court.<sup>282</sup> In his concurring opinion in *Weiss v. United States*,<sup>283</sup> Justice Scalia captured the essence of the matter, observing that Congress had achieved due process within the meaning of the Due Process Clause<sup>284</sup> when it set up a framework to give procedural protection to ser-

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276. *Cf. id.* at 225-26 (discussing the importance of soldiers internalizing the values of their larger military group to carry out the unpleasant duties of combat, as well as less dangerous duties in rear-echelon areas).

277. 420 U.S. 738 (1975).

278. *Id.* at 757.

279. *See* Hirshhorn, *supra* note 267, at 224-27.

280. *Schlesinger*, 420 U.S. at 757.

281. *See* Hirshhorn, *supra* note 267, at 231.

282. *See* O'Connor, *supra* note 268, at 161 (“At the risk of oversimplification, the military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context.”).

vice members.<sup>285</sup> “That is enough,” he wrote, “and to suggest otherwise arrogates to this Court a power it does not possess.”<sup>286</sup>

The statutory due-process framework of the court-martial system, as a legislative court, differs considerably from the Article III courts. As with all legislative courts, there is no requirement for an independent judiciary with tenure and salary protections; it is enough that the UCMJ and military regulations effectively insulate them from unlawful command influence.<sup>287</sup> It has long been settled that the rights of grand jury presentment and trial by petit jury do not apply to courts-martial.<sup>288</sup> The Sixth Amendment right to assistance of counsel is not required at summary courts-martial.<sup>289</sup> As for actual court composition, the Supreme Court has stated that this is a matter appropriate for congressional action.<sup>290</sup> Lower courts have rejected the idea that convening authority selection of panel members somehow violates due process, noting that Congress deliberately continued the historical scheme of convening authority panel member selection despite strong objections to the process.<sup>291</sup>

The accused in a court-martial enjoys due process rights that are similar to the fundamental rights the Court recognized in the consular and

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283. 510 U.S. 163 (1994). In *Weiss*, the Court addressed whether the appellant’s convictions violated due process because the military judge had been appointed in violation of the Appointments Clause and because the lack of a fixed term of office for military judges violated the Due Process Clause. The Court held that military judges, as officers, had already been properly appointed and did not require a separate appointment under the Appointments Clause. The Court noted that the Constitution does not require life tenure for Article I judges, but that the statutory and regulatory protections in place provided adequate due process protections for service members. *Id.* at 166-79.

284. “Nor shall [any person] . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

285. *See Weiss*, 510 U.S. at 197 (Scalia, J., concurring).

286. *Id.*

287. *See id.* at 176-77.

288. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 40 (1942) (stating that cases arising in the land and naval forces are excluded from grand jury indictment by the Fifth Amendment, and excluded by implication from the Sixth); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (stating that the Framers intended to limit the Sixth Amendment trial by jury to those subject to indictment by the Fifth Amendment).

289. *Middendorf v. Henry*, 425 U.S. 25 (1976). A summary court-martial is a one-man court in which neither the prosecution nor the defense is permitted representation by counsel. For certain grades of enlisted soldiers, the maximum penalty is up to thirty days’ incarceration. A soldier who objects to trial by summary court-martial may demand trial by a higher level of court-martial (with greater due process rights and greater punishment potential) as a matter of right. *See UCMJ art. 20* (2002).

Insular cases.<sup>292</sup> He has the right to assistance of counsel at all levels of court-martial except the summary court,<sup>293</sup> to be informed of the charges against him,<sup>294</sup> to a speedy trial,<sup>295</sup> to compulsory process of witnesses and evidence,<sup>296</sup> to the privilege against self-incrimination,<sup>297</sup> and he has extensive appellate rights.<sup>298</sup> In short, the UCMJ ensures that a military accused receives due process of law before a competent and impartial tribunal.<sup>299</sup> When placed into its proper context as a legislative court formed in furtherance of a constitutionally enumerated congressional power, the statutory grant of due process in a court-martial compares quite favorably with what a criminal accused can demand as a matter of right in the other

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290. *Whelchel v. McDonald*, 340 U.S. 122 (1950). The petitioner was convicted of raping a German woman. He argued that, although the Articles of War at the time did not permit enlisted men to serve on court-martial panels, he was entitled to have them. The Court stated that he could

gain no support from the analogy of trial by jury in the civil courts. The right to trial by jury guaranteed in the Sixth Amendment is not applicable to trials by courts-martial or military commissions. . . . The constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action.

*Id.* at 126-27 (citations omitted).

291. *McDonald v. United States*, 531 F.2d 490, 493 (Ct. Cl. 1976).

292. *See generally supra* Section II.D.2.

293. UCMJ art. 27 (providing for the detail of trial and defense counsel to general and special courts-martial).

294. *Id.* art. 35 (establishing procedures for serving the charges on an accused and guaranteeing that he cannot be tried for a certain period of time thereafter (five days for a general court-martial, and three days for a special court-martial) over his objection).

295. MCM, *supra* note 8, R.C.M. 707 (requiring that an accused be brought to trial within 120 days after preferral of charges, imposition of pretrial restraint, or entry on active duty for the purpose of trial).

296. UCMJ art. 46 (guaranteeing equal opportunity to obtain witnesses and evidence).

297. *Id.* art. 31.

298. *See generally id.* arts. 60 (empowering the convening authority to grant clemency on findings or sentence), 66 (establishing service courts of criminal appeals), 67 (providing for review by a civilian Court of Appeals for the Armed Forces), 67a (granting the right for an accused to seek review from the Supreme Court by writ of certiorari).

299. *See, e.g., United States v. Modesto*, 43 M.J. 315, 318 (1995) (stating that the "sine qua non for a fair court-martial" is impartial panel members, and noting the variety of procedural safeguards in the military justice system to ensure the impartiality of the members).

legislative courts. The balance that Congress has struck will not lightly be disturbed by an Article III court.<sup>300</sup>

### III. Analysis of Attacks on Convening Authority Appointment of Panel Members

*The beginning of wisdom in the law is the ability to make distinctions, to withstand the reductionist pressure to say that one thing must necessarily lead to another.*<sup>301</sup>

Current reform efforts attack the role of the convening authority on three broad theoretical fronts. The first front seeks to blur the distinction between court-martial panels and juries as a means to imposing random panel member selection on the military justice system.<sup>302</sup> The second front takes an internationalist bent, arguing that because Great Britain and Canada, whose military justice systems share a common heritage with the United States in the British Articles of War, have removed the convening authority from panel selection, so should the United States.<sup>303</sup> The third front is fought in the courtroom by a bare majority of the CAAF, who have judicially legislated a significant modification to UCMJ Article 25(d)(2) using a weapon of their own creation: an implied bias doctrine that substitutes judicial speculation for the measured fact-finding and deliberation of Congress.<sup>304</sup> This section examines each of these attacks in turn.

#### A. Random Selection and the Application of the Jury-Selection Template to Courts-Martial

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300. *Cf. Middendorf v. Henry*, 425 U.S. 25, 44 (1976) (noting, with respect to summary courts-martial, that Congress had twice entertained and rejected proposals to eliminate them; therefore, it would take extraordinarily weighty factors to upset the balance struck by Congress). On at least three occasions, Congress considered and rejected proposals to eliminate the convening authority's role in panel member selection, each time apparently concluding that retaining the process maintained a proper balance between individual rights and Congress's power to govern and regulate the armed forces. *See supra* Section II.C.4 (discussing congressional oversight of the UCMJ since 1950, and discussing reform proposals that would eliminate the convening authority from the panel selection process).

301. Bator, *supra* note 225, at 263.

302. *See infra* Section III.1.

303. *See infra* Section III.2.

304. *See infra* Section III.3.

1. *The Strategy: Blur the Lines Between Juries and Courts-Martial*

Reform efforts that have random selection as their ultimate goal often employ a strategy that blurs the lines between court-martial panel selection and jury selection. While nominally accepting the axiom that the Sixth Amendment jury trial right does not exist at courts-martial, these efforts nevertheless engraft the doctrines and principles of the Supreme Court's jury selection jurisprudence onto the court-martial system, claiming that random selection is a necessary antecedent to due process and the only way truly to avoid unlawful command influence.

A prime example of this strategy is an article, *Courts-Martial and the Commander*,<sup>305</sup> published over thirty years ago by Major General Kenneth J. Hodson, a section of which is devoted to reforming the court-martial panel selection process. The underlying premise of General Hodson's argument is that convening authority selection of panel members is undesirable because it is either actually unfair or presents the appearance of evil.<sup>306</sup> To solve the problem, he suggests using the Supreme Court's jury selection jurisprudence as a template for the military justice system.<sup>307</sup>

Terminology is the first thing to fall as the article loosely interchanges the nomenclature of the jury and the court-martial panel.<sup>308</sup> Next, the article confounds the goals of the two systems. Citing seminal Supreme Court cases<sup>309</sup> and the ABA Standards for Criminal Justice,<sup>310</sup> the article defines the goal of the jury system as "random selection from a cross-section of the

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305. Hodson, *supra* note 25.

306. *See id.* at 64. Hodson recognizes that the UCMJ provides remedies for unlawful command influence but says it is not good enough: "The military system has the appearance of evil and the potential for abuse." *Id.*

307. *Id.*

308. *See, e.g., id.* at 60 ("the military jury differs from the civilian jury in that it almost always consists of less than twelve members"), 64 ("The members of a court-martial (the military jury) are selected by the commander.").

309. The article quotes *Williams v. Florida*, 399 U.S. 78, 100 (1970), for the idea that the essential feature of a jury is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence." Hodson, *supra* note 25, at 61. This is significantly different from the military tradition of a panel of professionals who judge an accused based on the facts and decide the case based not only on common sense, but also on the principles of military law and their shared sense of the demands of good order and discipline.

310. Hodson, *supra* note 25, at 62, 64 (quoting AMERICAN BAR ASSOCIATION, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 2.1(a), at 48-51 (1968)).

community,”<sup>311</sup> an unexceptionable conclusion. The article next transfers this goal—lock, stock, and barrel—to the military justice system: “Given the goal of random selection from a cross-section of the community, the present law which allows the commander to select military jurors, and even to exclude enlisted men unless they are requested by the accused, should be changed.”<sup>312</sup> The article suggests a form of random selection in which the military judge would solicit names from the units in his judicial district and use a jury wheel to draw names for trial.<sup>313</sup> Finally, the analysis of the proposed system almost entirely glosses over the effects random selection might have on the operational effectiveness of the military justice system in both peace and war.<sup>314</sup>

With relatively minor exceptions, the various attacks on panel member selection for the past thirty years generally follow the analytical template established by Hodson’s article. The starting point is almost always the premise that command control of the court-martial selection process is either actually evil or presents the appearance thereof.<sup>315</sup> Next, the interchange of terminology and concepts<sup>316</sup> prepares the way for the interesting but inapposite historical discussion of the common law jury.<sup>317</sup> The interchange of terminology and concepts may seem like a small thing, but in its effect of blurring the distinctions between the two systems, it sets up a hol-

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311. *Id.* at 64.

312. *Id.* It is interesting that the modern-day ABA standards relating to jury trials specifically note that they do not apply to the procedures of military justice tribunals. *See* AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY standard 15-1.1(d) (3d ed. 1996) [hereinafter ABA STANDARDS], available at [http://www.abanet.org/crimjust/standards/jurytrial\\_toc.html](http://www.abanet.org/crimjust/standards/jurytrial_toc.html).

313. Hodson, *supra* note 25, at 64.

314. The article proposes presumptively disqualifying the lowest two or three enlisted grades, using a questionnaire to help streamline the voir dire process, and providing discretion for the judge to excuse those who are unavailable because of their duties. It does not discuss in any detail the process by which the commands within the proposed judicial districts would submit names to the military judge or how improper command influence would be avoided in that process. The article does not analyze the effect such a random selection system might have in a deployed or combat environment. *See generally id.* at 64-65.

315. *See, e.g.,* Barry, *supra* note 25, at 103 (“In the United States, however, this troublesome issue of the [convening authority] as prosecutor remains.”); Glazier, *supra* note 25, at 4 (“At best, military jury selection incorporates the varied individual biases of numerous convening authorities and their subordinates. At worst, it involves their affirmative misconduct. ‘Court-stacking’ is consistently achieved, suspected, or both.”); Young, *supra* note 25, at 106 (“Article 25(d)(2) . . . is the problem. . . . As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate.”).

low analogy. The reader becomes indignant that military panels are selected contrary to the constitutional provisions governing civil jury selection. Following these preparatory steps, it is a simple matter to transfer jury goals and jurisprudence to the court-martial system.<sup>318</sup> Various

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316. For examples of the indiscriminate interchange of terminology, see, for example, Glazier, *supra* note 25, who consistently refers to military juries, and asserts that the panel always has been a jury; Lamb, *supra* note 25, who consistently switches between using the terms “jury” and “panel” to refer to a court-martial panel; and Rudloff, *supra* note 25, who uses the term “jury” almost exclusively to refer to court-martial panels. Surprisingly, the military appellate courts occasionally interchange the terms. See, e.g., *United States v. Upshaw*, 49 M.J. 111, 114 (1998) (“perhaps some of these cases which challenge the convening authority’s role and methods in selecting the members of the jury for the trial of appellant will be resolved if Congress passes legislation which will mandate random selection of jury members”) (Sullivan, J., concurring); *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978) (freely interchanging the terms “jury” and “jurors” with “panel” and “members”). Some commentators seeking to change the system, however, scrupulously maintain the difference in terminology. See, e.g., Young, *supra* note 25 (consistently using the appropriate court-martial terminology, but applying jury selection concepts and principles); McCormack, *supra* note 25 (carefully noting the differences between a military panel and a jury, but applying concepts and principles of the jury to the panel selection process).

317. The analysis of the civilian jury system has attained the status in military legal writing of certain stock characters in popular romances: just as no romance is complete without a tall, dark, handsome, and mysterious stranger, few articles on court-martial reform are complete without an analysis of the development of the civilian jury system. Three of the more recent examples include Glazier, *supra* note 25, at 6-44, who leads off his article with a thorough analysis of the development of the jury system and asserts that courts-martial were unconstitutionally left out of the process; Lamb, *supra* note 25, at 105-13, who begins with a review of jury development from antiquity; and McCormack, *supra* note 25, at 1016-27, who discusses the history and role of the jury system from ancient Greece to modern times.

318. The transfer of concepts takes several forms. Lamb directly compares the court-martial process with the ABA standards for jury selection in criminal trials and federal practice, concluding that the military system falls short in many areas. See Lamb, *supra* note 25, at 129-32. Glazier takes the more radical approach that the Supreme Court has been wrong for over one hundred and fifty years in interpreting the Sixth Amendment to exclude courts-martial from the jury trial guarantee; he would adopt a random selection system to the military structure and, in his words, exceed the constitutional standards. See Glazier, *supra* note 25, at 72-91. McCormack takes a principled look at the goals of the jury system, analogizes those goals to the panel selection process, and suggests random selection. See McCormack, *supra* note 25, at 1023-27, 1048-50. Young briefly discusses the parameters of the civilian system and spends most of the article focusing on random selection as a method that will eliminate the perceived shortcomings of the system. See Young, *supra* note 25, at 93-94, 106-08. The Cox Commission dispenses with analysis altogether in proclaiming that there is no aspect of military criminal procedure that diverges further from civilian practice than the convening authority selecting panel members and recommends random selection from lists provided by the commander. See COX COMMISSION, *supra* note 26, at 7.

solutions are then proposed, almost all offering a form of random selection coupled with appropriate revisions to UCMJ Article 25.<sup>319</sup> Many commentators are enamored by computers,<sup>320</sup> which promise to simplify all tasks relating to panel administration and add a disinterested analytical purity to the system.

There are three basic problems with this line of attack. First, in blurring the lines between juries and court-martial panels, proponents of change either dismiss or fail to take cognizance of the considerable structural barriers between court-martial panels and petit jury trials. Second, the random selection solution offers illusory change that is more form than substance. Third, random selection adds additional complexity to court-martial administration and interferes with the systemic goals of efficiency, effectiveness, and utility under a wide variety of circumstances.

2. *Response: The Structural Barriers and Theoretical Inconsistencies of Applying the Jury-Selection Template to Courts-Martial*

a. *Article III and the Sixth Amendment as Structural Barriers*

In creating a new nation, the Framers had the opportunity to curb the powers of the government, guarantee individual rights and freedoms, and break from the customs and traditions of a system that had oppressed them. Through the Constitution, the Framers were able to remedy the ills caused by a sovereign who “affected to render the Military independent of and

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319. See generally *supra* note 25.

320. Glazier, for example, envisions a “computer-maintained” database for court members, operated by the installation G-1 as an additional duty. Database fields would include name, rank, report date, and availability. In what would surely be a personnel officer’s nightmare, the availability field would require constant updating to account for leave, deployments, temporary duty, and so forth. During wartime, the senior in-theater commander would create “virtual installations” that would use this program to manage courts-martial that might take place in theater. See Glazier, *supra* note 25, at 68-72. In a lecture at The Judge Advocate General’s School of the Army, David Schlueter advocated random selection as an alternative, saying that a computer could be programmed with Article 25 criteria to produce a cross-section of officers and enlisted personnel. He said, “I cannot imagine that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a servicemember’s liberty and property interests are at stake.” Schlueter, *supra* note 25, at 20. Young establishes a broad random selection scheme and recommends the use of a computer program to manage it, but provides no details about how the program would work. See Young, *supra* note 25, at 118-20.

superior to the Civil Power”;<sup>321</sup> “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries”;<sup>322</sup> and who “depriv[ed] us, in many Cases, of the Benefits of Trial by Jury.”<sup>323</sup> As this article has already shown, the Framers ensured that the military would be dependent on and submissive to the civil power by making the President the Commander in Chief,<sup>324</sup> but granting the Congress power over the purse.<sup>325</sup> To remedy the lack of judicial independence, the Framers provided tenure and salary protections for Article III judges.<sup>326</sup> And to ensure that the right to trial by jury could not be tampered with, they enshrined it in the basic text of the Constitution.<sup>327</sup>

There can be little doubt that the guarantee of trial by a jury of peers is one of the salutary civil rights enjoyed by a free people. Blackstone once responded to a critic of the British Empire who predicted its downfall by observing, “the writer should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury.”<sup>328</sup> Yet, even as they provided for trial by petit jury both in the text of the Constitution itself<sup>329</sup> and in the Bill of Rights,<sup>330</sup> the Framers structurally denied it to military personnel being tried by courts-martial.

In analyzing the exclusion of courts-martial from the jury trial guarantee, this section examines three areas: first, the Framers’ first-hand familiarity with military justice; second, the probable reasons for the inapplicability of the Article III jury trial guarantee to courts-martial; and third,

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321. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

322. *Id.* para. 11.

323. *Id.* para. 20.

324. U.S. CONST. art. II.

325. *Id.* art. I, § 8, cl. 12.

326. *Id.* art. III, § 1.

327. *See id.* art. III, § 2, cl. 3. Article III of the Constitution states in part:

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

*Id.*

328. 2 WILLIAM BLACKSTONE, COMMENTARIES 379, *quoted in* United States v. Dorr, 195 U.S. 138, 157 (1904) (Harlan, J., dissenting).

329. U.S. CONST. art. III, § 2.

330. *Id.* amend. VI.

the constitutional impossibility of the Sixth Amendment jury trial right applying to courts-martial.

One cannot argue that the Framers excluded courts-martial from the constitutional petit jury trial guarantees out of ignorance. To the contrary, the men who gathered to write the Constitution had considerable military experience and well understood the place of the military in society. They also understood the importance of fundamental civil rights and knew how to balance the demands of civil society with the needs of the military. Eugene Van Loan has written, “Familiarity with the arts and ways of war was . . . a prominent part of the cultural heritage of the architects of the Constitution.”<sup>331</sup> Every one of the original colonies had been authorized, either explicitly or implicitly, to form local defense organizations to help combat the hostile environment of the new world. The colonies had enacted universal military training and rudimentary articles of war, and many colonists gained military experience both serving in and leading these militia units.<sup>332</sup> During the French and Indian War from 1754-1763, the British recruited regiments of colonial volunteers that were organized as quasi-regular units and were subject to the British Articles of War; many colonists also served in the British Navy during this period and were subject to British naval justice.<sup>333</sup>

Thus, by the time the Revolutionary War began, there was already a strong military tradition in the United States. Many of those responsible for the Constitution and the Bill of Rights served in the military during the Revolutionary War. For example, John Marshall, who figured prominently in the Virginia ratification convention and helped draft Virginia’s proposals for a federal bill of rights, had been the Army’s Deputy Judge Advocate during the war.<sup>334</sup> When the Constitutional Convention convened in 1787, a number of delegates—including George Washington—had served in the Revolutionary War and subsequent Indian wars or had been otherwise involved in the military affairs of the United States.<sup>335</sup>

It is evident that the Framers were intimately familiar with the processes of military justice. They had been subject to it and had used it to help mold the Army that beat the British. They recognized its benefits—as John Adams said, the system had carried two empires to the head of civ-

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331. Van Loan, *supra* note 138, at 379.

332. *See id.*

333. *See id.* at 379-80.

334. Henderson, *supra* note 89, at 299.

335. Van Loan, *supra* note 138, at 387.

ilization<sup>336</sup>—even as they were wary of its potential for excess.<sup>337</sup> One must assume that even if the original decision to incorporate the British Articles of War had been “witless,”<sup>338</sup> the subsequent integration of a separate, legislatively controlled military justice system into both the Articles of Confederation and the Constitution was deliberate and volitional.

Likewise, excluding the military from the right to trial by jury was a deliberate and volitional act. Trial by jury was one of the few guarantees adopted by the Convention in the text of the Constitution itself.<sup>339</sup> There was little debate on this provision,<sup>340</sup> and none at all relating to its applicability to courts-martial.<sup>341</sup> Nevertheless, it has always been generally accepted that the provision does not apply to courts-martial.<sup>342</sup> There are several reasons for this assumption, supported by sound logic or authoritative constitutional jurisprudence.

First, the silence of the Framers concerning courts-martial and the Article III jury trial right speaks volumes. The Framers had already specifically ensured the continuation of an established practice of legislative promulgation of rules for the government of the armed forces.<sup>343</sup> They said nothing about jury trials in connection with courts-martial. On this issue of silence, Eugene Van Loan has elegantly written,

Neither the words themselves nor the recorded legislative history specifically reveal what relationship, if any, the jury was meant to have to the court-martial. Nevertheless, the documented familiarity of the convention delegates with the nature of each institution may indicate that their silence suggests that the jury

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336. See JOURNALS, *supra* note 116, at 670-71 n.2.

337. For example, the Continental Congress declined to apply martial law to the new Northwest Territory to fill the gap until the civil government had established itself. See Van Loan, *supra* note 138, at 385.

338. See *supra* note 119 and accompanying text (comments of Brigadier General Samuel Ansell).

339. U.S. CONST. art. III, § 2; see also Van Loan, *supra* note 138, at 395 (discussing the constitutional guarantees adopted by the Convention).

340. Van Loan, *supra* note 138, at 395.

341. *Id.*; see also Henderson, *supra* note 89, at 300.

342. See, e.g., Henderson, *supra* note 89, at 300 (observing that it was clear the Framers did not intend the jury trial right to extend to courts-martial). *But see* Glazier, *supra* note 25, at 16 (asserting that because the text of Article III does not exclude courts-martial as it does cases in impeachment, the jury trial right necessarily extends to courts-martial).

343. See *supra* note 146 and accompanying text.

and the court-martial were contemplated to have no constitutional relationship whatever.<sup>344</sup>

Furthermore, there is a good argument that the Framers intended the Article III jury trial guarantee merely as a codification of a contemporary common law jury trial right that did not extend to trials by court-martial. Sound jurisprudence supports this point of view. In *Callan v. Wilson*,<sup>345</sup> the Supreme Court stated its conviction that Article III “is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.”<sup>346</sup> At common law, there was no right to a jury trial in a court-martial,<sup>347</sup> the court-martial itself provided its own procedures and system of due process.

The Supreme Court recognized early on that the power to provide for the trial and punishment of service members is “given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States.”<sup>348</sup> This does not mean that “courts-martial somehow are not courts, or that [they] somehow decide cases while avoiding ‘judicial’ behavior.”<sup>349</sup> Rather, it means that when courts-martial perform judicial functions, they do not partake of “the judicial Power” embodied in Article III.<sup>350</sup> Trial by jury as guaranteed in Article III does not, therefore, structurally exist as a constitutional right at courts-martial.

Nor does the jury trial guarantee of the Sixth Amendment apply to courts-martial. The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>351</sup> This language does not expressly exclude courts-martial,

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344. Van Loan, *supra* note 138, at 396.

345. 127 U.S. 540 (1888).

346. *Id.* at 549. The Court expressly found that the common law provided a jury trial for the offense of conspiracy. *Id.*

347. See *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (“Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals.”); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 10 (1958) (noting that at the time the Constitution was written, most military offenses were not even cognizable at common law, and observing that the jurisdiction of courts-martial has expanded considerably since then).

348. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

349. Stern, *supra* note 226, at 1055.

350. *Id.*

but as with Article III, the generally accepted view is that it does not apply to courts-martial.<sup>352</sup> Two main factors support this conclusion. First, analysis of the constitutional drafting process indicates that the Framers intended to exclude courts-martial from the Sixth Amendment petit jury guarantee. Second, authoritative jurisprudence has forever linked the military exclusion from grand jury presentment under the Fifth Amendment<sup>353</sup> with the petit jury right under the Sixth Amendment.<sup>354</sup>

There is little question that in the drafts leading up to the final versions of the Fifth and Sixth Amendments, draftsmen intended to exclude the military both from the right of presentment before a grand jury and trial before a petit jury. Although both of these rights had been a part of the common law for centuries,<sup>355</sup> they never had been a feature of the court-martial system, which developed independent of the common law. There appeared to be a common understanding among the states that these rights—and particularly the right to trial by petit jury—did not apply at courts-martial.<sup>356</sup> Accordingly, the states that submitted proposed lan-

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351. U.S. CONST. amend. VI.

352. *See, e.g.*, *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (observing that “the right to trial by jury has no application to the appointment of members of courts-martial”). *But see* Glazier, *supra* note 25, at 15 (“The language of the Constitution and the process and history of its drafting support the opposite inference.”).

353. The applicable part of the Fifth Amendment reads thus: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend V.

354. *See infra* note 371 and accompanying text.

355. *See* Wiener, *supra* note 347, at 3.

356. *See generally* Henderson, *supra* note 89, at 305-09. In this section, Henderson reviews the provisions of several states’ bills of rights pertaining to jury trials and the military. He notes that even in states that did not expressly except the military from these guarantees (Maryland, North Carolina, Pennsylvania, Vermont, and Virginia), the states used courts-martial to govern their militia, “to which the jury trial guarantees were clearly not meant to apply.” *Id.* at 306.

guage for a bill of rights to Congress included provisions excepting the military from the jury guarantees.<sup>357</sup>

The Fifth and Sixth Amendments had a common ancestor in the amendments adopted by the House and sent to the Senate for confirmation. Article the Tenth, as the House proposal was called, read thus:

Tenth. The trial of all crimes (except in cases of impeachment, and in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways [sic] crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the State.<sup>358</sup>

The Senate objected to the House version. Initially, the Senate stripped the House's Tenth Article of its petit jury guarantee and, a few days later, combined the grand jury provision (including the military exclusion) with another proposed amendment concerning double jeopardy and due process of law. This proposed amendment became our present Fifth Amendment.<sup>359</sup>

The Senate action stemmed from disagreements between the two legislative bodies concerning the nature and extent of the vicinage (locale)<sup>360</sup> from which the jury was to be drawn. The Senate was initially willing to discard the jury trial guarantee rather than yield on the issue of vicinage.<sup>361</sup> Significantly, there is no evidence that the Senate's dispute with the

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357. *See generally id.* at 306-10. Interestingly, some of the same states that failed expressly to exclude the military from their own bill of rights did so in the proposals they submitted to Congress. For example, Virginia, Maryland, and North Carolina all included similar provisions excluding the military from the jury trial guarantees. *Id.*

358. *Id.* at 312 (quoting S. JOUR., 1ST CONG., 1ST SESS. 114-19, 121-27, 129-31 (1789)).

359. *Id.* at 412-13.

360. The word "vicinage" means "vicinity" or "proximity" and is used to indicate "the locale from which the accused is entitled to have the jurors selected." BLACK'S LAW DICTIONARY 1561 (7th ed. 1999).

361. *See Van Loan, supra* note 138, at 409.

House's article had anything to do with excluding the military from the petit jury guarantee.<sup>362</sup>

Eventually, the two houses reached a compromise on the vicinage issue that guaranteed the jury would be at least drawn from the same state in which the crime was committed, but gave Congress the authority to define the vicinage later through the creation of judicial districts. The petit jury guarantee, however, was never recombined with the grand jury guarantee. Instead, it was placed with the Senate's Eighth Article after the guarantee of a speedy and public trial, and the military exclusion language was not duplicated; this amendment became the present Sixth Amendment.<sup>363</sup> Thus, what started out as one common amendment was split into two by virtue of a disagreement that had nothing to do with military justice.

Nothing in the record indicates why the Senate did not simply recombine the compromise petit jury guarantee with the original grand jury language, thereby ensuring that the military exclusion would explicitly have applied to them both. The most likely possibility, according to Henderson and Van Loan, is that it was an oversight due to the exhaustion of the members of Congress.<sup>364</sup> This theory makes sense when one considers the timing involved in the passage of the amendments. The Congress could not adjourn until the amendments were passed, and when the conference committee was appointed on 21 September 1789, the members of Congress were already tired and were eager to return home. The committee met in haste, finishing its work on September 24th; by September 29th, the amendments had passed both houses and Congress was adjourned.<sup>365</sup>

We are not left, however, simply with speculation on the matter. Further evidence of contemporary congressional intent is provided by an Act reported to the House on 17 September 1789, "to recognise, and adapt to the Constitution of the United States, the establishment of the troops raised under the resolves of the United States in Congress assembled."<sup>366</sup> Section 4 of the Act prescribed that the Army would be governed by the rules and articles of war established by Congress, a "manifestation of Congress's recognition—during the very period in which it passed the Bill of Rights—that the army was to be continued to be governed by its traditional and sep-

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362. See Henderson, *supra* note 89, at 313.

363. Van Loan, *supra* note 138, at 409.

364. See *id.* at 411-12; Henderson, *supra* note 89, at 305, 323.

365. See Van Loan, *supra* note 138, at 411.

366. See *id.* at 413.

arate system of courts-martial, unaffected by the proposed new amendment guaranteeing the right to trial by petit jury.”<sup>367</sup>

In addition to the evidence of congressional intent from the drafting process and contemporary legislation, the Supreme Court has also provided authoritative jurisprudence on the exclusion of courts-martial from the Sixth Amendment jury trial guarantee. In *Ex parte Milligan*,<sup>368</sup> the Court addressed whether Lamdin P. Milligan, a U.S. citizen, had been properly tried by a military commission in Indiana during the Civil War. The Court held that the trial violated Milligan’s rights by subjecting him to a non-Article III tribunal and denying him the right to presentment by grand jury and trial before a petit jury during a time when the federal authority in Indiana was unopposed and the courts were open.<sup>369</sup> In analyzing the case, the Court made a statement in dicta that has, over the years, evolved into the force of a holding: “the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”<sup>370</sup> This linkage has been consistently interpreted, not only by the Supreme Court, but also by the military appellate courts, to preclude courts-martial from the Sixth Amendment jury trial guarantee.<sup>371</sup>

Efforts have been made to demonstrate that the Supreme Court’s refusal to apply the Article III or Sixth Amendment jury trial guarantees to courts-martial is wrong or even unconstitutional.<sup>372</sup> The fact remains, however, that in the structure and framework of the Constitution and its amendments, the Framers forever barred trial by jury at courts-martial as a matter of right. Inasmuch as Congress has not chosen to grant a jury trial at courts-martial statutorily, it is a mistake to mingle carelessly the juris-

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367. *Id.* at 414.

368. 71 U.S. (4 Wall.) 2 (1866).

369. *Id.* at 121-23.

370. *Id.* at 123.

371. *See, e.g.,* *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. Courts-martial have been composed of officers both before and after the adoption of the Constitution.”); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (“[C]ases arising in the land or naval forces’ are deemed excepted by implication from the Sixth Amendment.”); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988) (“The right of trial by jury has no application to the appointment of members of courts-martial.”).

prudence of Sixth Amendment jury selection with the constitutionally and functionally different process of court-martial panel member selection.

*b. Random Selection and the Illusion of Form over Substance*

Attempts to reform the panel member selection process through random selection elevate form over substance. This is largely because the consequences of a pure random selection system are virtually inconceivable in a military setting. The majority of service members are in the junior enlisted ranks, young, and with relatively little military experience.<sup>373</sup> In a pure random selection scheme—one that would actually embody the Supreme Court<sup>374</sup> and ABA<sup>375</sup> ideal of a randomly selected cross-section of the community—these junior members would most likely comprise a substantial percentage of any given court-martial panel. To be a purist—to meet the ideal—one would have to be willing to discard a number of venerable and practical military justice customs: the tradition that one's actions will never be judged by someone junior in rank or experience,<sup>376</sup> the philosophy that those who judge will be sufficiently acquainted with the principles of good order and discipline to place alleged offenses in their

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372. See, e.g., Glazier, *supra* note 25, at 8-22 (asserting that the Supreme Court's failure to apply the Article III and Sixth Amendment jury guarantees to courts-martial is an old and flawed judicial creation); Remcho, *supra* note 25, at 204 (claiming that there is "questionable precedential support" for the Supreme Court's analysis that Article III and the Sixth Amendment jury trial guarantees do not apply to courts-martial). But see O'Connor, *supra* note 268, at 178 n.76 ("Although the author agrees that the Court's statements in *Miligan* regarding servicemembers' Sixth Amendment jury right are technically dicta, the author simply cannot accept Major Glazier's ably-presented argument that the centuries-old practice of conducting courts-martial without a jury of the accused's peers somehow now runs afoul of the Constitution.").

373. See MILITARY FAMILY RESOURCE CENTER, U.S. DEP'T OF DEFENSE, PROFILE OF THE MILITARY COMMUNITY: 2001 DEMOGRAPHICS REPORT (2001) [hereinafter MFRC REPORT], available at <http://www.mfrc.calib.com/stat.cfm> (stating that about 62.5% of all service members in the Department of Defense are in the ranks E-5 and below, and that 46.8% of all active duty personnel are twenty-five years old or younger).

374. See *Williams v. Florida*, 399 U.S. 78, 100 (1970) (stating that a jury drawn from a representative cross-section of the community is an essential element of due process).

375. See ABA STANDARDS, *supra* note 312, standard 15.2.1(a) ("The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community.").

376. This tradition is embodied in UCMJ Article 25(d)(1) (2002) ("When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.").

proper context,<sup>377</sup> and the statutory mandate to assure that those who serve on courts-martial are best qualified for the duty.<sup>378</sup>

Few are willing to abandon those unique benefits or essential characteristics of the military justice system, so reformers propose modifications of random selection: (1) let the commander choose a list of those whom he believes to be qualified, and randomly select from that list;<sup>379</sup> (2) screen individuals for Article 25(d)(2) criteria, and then spit out a randomly generated list;<sup>380</sup> (3) appoint an independent jury commissioner to make the selections;<sup>381</sup> (4) presumptively disqualify a major percentage of service members—those below the grade of E-3, for example—and randomly select from the rest;<sup>382</sup> (5) modify the Article 25(d)(2) criteria to make them more easily fit a computer database model and facilitate random selection;<sup>383</sup> or (6) modify the random selection criteria to ensure that all panel members are senior to the accused and that the “random selection” produces a cross-section of rank.<sup>384</sup> Do anything, in short, but accept the consequences of an actual random selection scheme.

In building the illusion that random selection solves the perceived problems of panel member selection, reformers tend to ignore or downplay

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377. This harkens back to the earliest days of military justice tribunals. For example, under the Gustavus Adolphus Code, the membership of the higher court-martial included the top leadership of the Army, every regimental colonel, and even colonels from other nations. *See supra* note 62 and accompanying text.

378. UCMJ art. 25(d)(2).

379. COX COMMISSION, *supra* note 26, at 7.

380. *See, e.g.*, Brookshire, *supra* note 25, at 100-02 (establishing screening criteria to be used before random selection).

381. *See, e.g.*, Lamb, *supra* note 25, at 161-62.

382. *See, e.g.*, Hodson, *supra* note 25, at 64 (suggesting that soldiers in grades E-1 through E-3 should probably be presumptively disqualified); Young, *supra* note 25, at 119 (suggesting that all servicemembers, officer and enlisted, with less than two years' military service be excluded). The Court of Military Appeals has already sanctioned a modified version of this approach as consistent with UCMJ Article 25(d)(2), provided that the convening authority personally approves the results of the random selection. *See infra* notes 390-394 and accompanying text.

383. *See, e.g.*, Glazier, *supra* note 25, at 68 (recommending that Article 25 be abandoned); Lamb, *supra* note 25, at 160 (recommending that the subjective criteria of Article 25 be abandoned); Young, *supra* note 25, app. (deleting subjective criteria of Article 25 from proposed revision of Article 25); McCormack, *supra* 25, app. (same).

384. *See, e.g.*, Glazier, *supra* note 25, at 101-03 (maintaining the seniority requirement of Article 25(d)(1), and proposing rank-group restrictions on pure randomness to obtain a better cross-section); *see also* Young, *supra* note 25, at 120-21 (recommending that because military demographics are so weighted toward the young and inexperienced, the random selection program should guarantee a cross-section of the military by grade).

the inconvenient theoretical inconsistencies of their proposals. It is almost as if random selection is its own goal, no matter how removed the proposed modifications might take it from the justifications that were used to claim its necessity. Moreover, no one addresses how random selection would change anything but a perception; those commanders who truly desire to influence courts-martial unlawfully will find a way to do it regardless of the personnel or methods involved in panel member selection.<sup>385</sup> As the JSC concluded, “[E]ven a completely random method of selection may not improve perceptions of command influence because members will still be subject to the orders, assignments, and evaluations of the superiors who refer charges to trial.”<sup>386</sup> In essence, reformers have cried out, “The Emperor is naked!,” and then suggested clothing him with fig leaves.

*c. Mandatory Random Selection Undermines the Unique Goals of the Military Justice System*

Mandatory random selection, in removing the commander from the panel selection process, sends the message that the military justice system is more important than the military. At best, random selection confers no actual benefit on the military justice system. At worst, it adds additional administrative burdens that needlessly complicate the system, reduce its efficiency, and most critically, withdraw from commanders the ability to direct the disposition of their personnel. Random selection destroys the discretion of convening authorities to select specialized panels based on the unique needs of a case.<sup>387</sup> In addition, random selection deprives the accused of the important benefit of knowing in advance the names and dispositions of those who will judge him, thus permitting him to decide intelligently whether it will be in his best interest to select trial before a panel or before a military judge sitting alone.<sup>388</sup> Many mandatory random selec-

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385. See Spak & Tomes, *supra* note 25, at 535:

Similarly, revamping the court-member selection process and renewing emphasis on the prohibition against retaliatory action against court members would not change the fact that commanders can easily harm the careers of court members by taking actions that stop short of violating Article 37(b). And court members know it. A poor convening authority can give a court member a bad efficiency report for his or her part in reaching a decision that the convening authority dislikes. A more savvy one would “damn with faint praise.”

*Id.*

386. JSC REPORT, *supra* note 32.

tion schemes would deprive the accused of his ability to choose between an officer and mixed officer-and-enlisted panel.<sup>389</sup>

However, if a convening authority chooses to use random selection to assist in narrowing the field of candidates from whom she will personally select a court-martial panel, that option is already available. The great, untold secret of random selection is that it has been legally available as a method of panel member selection for nearly a quarter-century.

In *United States v. Yager*,<sup>390</sup> the accused was tried before a panel that had been randomly selected pursuant to a local regulation at Fort Riley, Kansas. The random selection program at Fort Riley was designed to dovetail with the requirements of UCMJ Article 25(d)(2). The installation used personnel data files and screening questionnaires to create a list of qualified panel members, from whose ranks the court-martial panels were randomly selected before final approval by the general court-martial convening authority.<sup>391</sup> The accused appealed on the basis that rank had impermissibly been used as a criteria to systematically exclude low-ranking personnel. The Court of Military Appeals (CMA) affirmed the conviction, holding that the exclusion of E-1s and E-2s was in accordance with

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387. Under the current system, a convening authority is free to select panel members who have specialized knowledge or experience. *See, e.g.*, *United States v. Lynch*, 35 M.J. 579 (C.G.C.M.R. 1992). In *Lynch*, the accused was a commander who was tried for hazarding a vessel when his Coast Guard buoy tender ran aground. The general court-martial convening authority selected a panel in which all members had experience as commanders afloat. The accused complained of panel-stacking, but the Coast Guard court disagreed, holding that such a court, by virtue of its training and experience, would better be able to understand the evidence and apply it to the standard of care expected of a commanding officer. *Id.* at 587. *See also* *United States v. Simpson*, 55 M.J. 674, 691-92 (Army Ct. Crim. App. 2001) (upholding a convening authority's decision to exclude all members from the accused's unit from a panel in order to keep the panel free from individuals who might have been tainted by prior exposure to the investigation, the accused, the victims, and witnesses); *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 2002 CAAF LEXIS 1614 (Dec. 2, 2002) (upholding a convening authority's decision to exclude members of the Base Medical Group from a court-martial panel to have a fair trial because all four conspirators and many of the witnesses came from that group).

388. *Cf. Young, supra* note 25, at 117 (dismissing the importance of the ability to assess whether a known panel or judge will be more lenient).

389. Article 25(c)(1), UCMJ, permits an accused to select a panel consisting of at least one-third enlisted membership. The presumption is that if he does not make that request, the panel will consist of officers only. *See* UCMJ art. 25(c)(1) (2002). The random selection schemes proposed by Lamb and Young recommend eliminating this choice. *See* Lamb, *supra* note 25, at 160-61; Young, *supra* note 25, at 108.

390. 7 M.J. 171 (C.M.A. 1979).

391. *Id.* at 171.

the statutory criteria of Article 25(d)(2) because application of the criteria would have excluded most of them anyway.<sup>392</sup> The CMA also approved of the random selection method, provided that the convening authority made the final decision based on Article 25(d)(2) criteria.<sup>393</sup>

*Yager* did not initiate a stampede to try random selection, despite later CMA opinions intimating that random selection coupled with convening authority approval of the final panel would not run afoul of UCMJ Article 25(d)(2).<sup>394</sup> Instead, *Yager* has been an anomaly of panel-selection jurisprudence.

Naturally enough, this leads to the question, why hasn't random selection been more popular in the military? In answering this question, it is worth taking a closer look at the system employed in *Yager*. The system, as already noted, was not pure random selection; the lower two enlisted ranks were presumptively disqualified, as were soldiers who were not U.S. citizens.<sup>395</sup> Moreover, the convening authority had directed that each court-martial panel would contain at least two field grade officers, each special court-martial would contain at least three officers, and each general court-martial panel would include at least four officers.<sup>396</sup> To obtain qualified panels, the installation Staff Judge Advocate sent detailed questionnaires to prospective court members. Those who did not return the questionnaires—and over one-quarter of the soldiers did not—were presumptively disqualified.<sup>397</sup> Once the questionnaires arrived at the Staff Judge Advocate's office, they had to be screened to create a qualified panel.<sup>398</sup> The administrative burden for both the SJA and the installation personnel office was enormous. A computer system would do little to

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392. *Id.* at 173.

393. *Id.* at 171.

394. *See* United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988).

395. *Yager*, 7 M.J. at 171. The CMA did not address the issue of exclusion of citizens for two reasons: it was not raised at the trial level, and the accused was himself a U.S. citizen. *Id.* at 173.

396. *See* JSC REPORT, *supra* note 32, app. J, at 3.

397. *Id.* This process, in itself, would create interesting panel selection issues. In essence, panel members were permitted to self-select themselves either on or off the panel, depending on whether they completed the questionnaire. Thus, panels could potentially be skewed toward soldiers with an interest in military justice, soldiers with an agenda who hoped to serve on panels, and soldiers and officers with non-demanding jobs who felt they had enough leisure time to serve on courts. In contrast, some of the best-qualified potential panel members may have escaped consideration for service simply by failing to turn in the questionnaire.

398. *Id.*

speed up the process of mailing, tracking, opening, or entering data from questionnaires.

The results of the experiment were, in addition, somewhat unclear. Not many cases were actually tried before panels,<sup>399</sup> and the military judge at Fort Riley felt that the panels failed to meet the best-qualified criteria. The judge noted, somewhat acerbically, "So far as I know, no one has ever contended that jurors should be immature, uneducated, inexperienced, have no familiarity with the military service, and have no judicial temperament."<sup>400</sup> He also criticized the program because, to comply with the law, the convening authority still had to appoint the panel personally; all the program accomplished was to force him to select those who were not, in his opinion, necessarily the best qualified.<sup>401</sup>

There are several lessons to be learned from this experience. First, a pure random selection system did not meet the needs of Article 25(d)(2) or the convening authority. The convening authority had to force a cross-section of ranks by mandating minimum numbers of officers and field grade officers on the panel. Second, the questionnaire method of determining qualifications permitted soldiers to self-select their participation in court-martial panels. Some of the best-qualified officers and soldiers on the installation may have declined to fill out a questionnaire, considering themselves too busy with other duties. Third, the system created an enormous administrative burden on the personnel office and Staff Judge Advocate's office at the installation. Fourth, and perhaps most important, the quality of the panels was degraded.

When rhetoric and inapposite comparisons with the jury system are replaced by examination of the actual effects random selection would have on the military, reason demonstrates that the current system best balances the varied needs of the individual services while still producing fair, impartial panels that meet the criteria of UCMJ Article 25(d)(2). Indeed, the JSC, at the direction of Congress, recently concluded as much in a detailed study of the effects random selection might have on the military.<sup>402</sup> Operating under the mandate that a random selection system would still have to produce best-qualified members according to the criteria of UCMJ Article

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399. *Id.* at 4.

400. See Letter from Colonel Robert L. Wood, Military Judge, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kansas 6 (Dec. 13, 1974), reprinted in JSC REPORT, *supra* note 32, app. K.

401. *Id.*

402. See JSC REPORT, *supra* note 32, at 47.

25(d)(2), they examined six different alternatives: maintaining the current practice, random nomination of panel members, random selection of panel members, a combination of random nomination and selection, expanding the source of potential panel members, and creating an independent selection authority.<sup>403</sup>

In concluding that the current system best meets the needs of the military, the JSC did not simply “pencil-whip” its analysis to meet pre-conceived conclusions. The committee’s report is an honest, thorough, and balanced look at each of the alternatives in light of theory, actual practice, and workability. In view of the varied mission-related needs of the services, including the duty to engage in combat if called upon to do so, the JSC reached some conclusions that ought to give pause to reformers who apparently believe military needs should have no bearing on the military justice system. A selection system must possess certain characteristics to be useful in a military setting. It must be “sufficiently flexible to be applied in all units, locations, and operational conditions and across all armed forces.”<sup>404</sup> It must recognize that competency and availability decisions are “critical command functions.”<sup>405</sup> Random methods do not meet those ends because they are not uniformly operable in all units, locations, and conditions, and they would “present substantial difficulties during heightened military operations to include war or contingency operations.”<sup>406</sup> A mandatory random selection scheme would increase administrative burdens, lower the overall level of competency of panels, and produce increased delays in the system.<sup>407</sup> In short, mandatory random selection falls far short of its theoretical promise and could actually frustrate the unique goals of the military justice system.

## B. Keeping up with the Joneses: Reform Based on British and Canadian Jurisprudence

### *1. The Strategy: Argue That American System Must Change to Keep Pace with Court-Mandated Overhaul of British and Canadian Systems*

It has become fashionable to disparage the UCMJ in comparison with recent reforms in the British and Canadian systems that significantly mod-

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403. *Id.* at 16.

404. *Id.* at 46.

405. *Id.*

406. *Id.*

407. *Id.* at 45.

ified the role of the court-martial convening authority. The Cox Commission, for example, claimed that “military justice in the United States has stagnated” in comparison with other countries around the world, particularly Great Britain and Canada.<sup>408</sup> The Bar Association for the District of Columbia, in its submission to the Cox Commission, argued that the decisions invalidating the role of the convening authority in Great Britain and Canada are particularly significant because “[t]he Uniform Code of Military Justice . . . shares a common ancestry with the British system found insufficiently independent in *Findlay* and *Lane*. The Canadian system invalidated in *Genereux* shares that common ancestor as well.”<sup>409</sup> Guy Glazier writes, “Canada, Great Britain, and the European Community all agree that member selection by the convening authority fails to meet minimum standards of independence and impartiality in practice and appearance,” and he calls it ironic that the United States, which fought for freedom from Great Britain, is alone in the free world in denying trial by jury to service members.<sup>410</sup>

At first blush, these are persuasive arguments. If the country that created the Articles of War saw fit to abandon the practice of convening authority panel selection, why hasn’t the United States? If the United States’ closest neighbor has rejected the practice, why doesn’t the United States? Surely the U.S. system should meet their minimum standards of independence and impartiality. The United States must be remarkably obtuse if it has not seen the light and spontaneously changed its military justice system to meet the requirements imposed on Great Britain and Canada by, respectively, the European Court of Human Rights and the Canadian Supreme Court.

These arguments have a certain specious charm. In measuring the significance of the British and Canadian actions, however, making the simplistic argument that because they have changed, so should America, is not enough. The decisions must be placed in their proper contextual frame-

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408. COX COMMISSION, *supra* note 26, at 3.

409. Memorandum from the Bar Association of the District of Columbia, to the Cox Commission, subject: Special Considerations Related to the “Final List of Topics” 11 (Mar. 13, 2001), *reprinted in* COX COMMISSION, *supra* note 26, app. C.

410. Glazier, *supra* note 25, at 88. Glazier’s statement about trial by jury is not quite accurate. The British system removed the convening authority from panel selection, but it did not appreciably change trial procedure. Now a Court-Martial Administration Officer (CMAO) handpicks the panel based on a list provided by the convening authority. *See infra* note 426 and accompanying text. Whatever benefits to freedom and independence this procedure may have, it is not a jury trial.

work. Furthermore, the practical effect of the changes bears examination as well. As will be seen, the British and Canadian changes were appropriate within a contextual and structural framework that has little, if any, actual relevance to the United States system.

2. *Response: A Structural and Contextual Analysis of the British and Canadian Changes*

a. *The British System and the European Convention for the Protection of Fundamental Rights and Human Freedoms*

In 1951, Great Britain ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>411</sup> Most European countries that adopted the Convention had to formally incorporate it into their domestic law under their individual constitutions. In Great Britain, however, the thought was that the rights and freedoms guaranteed by the Convention could be delivered under British common law.<sup>412</sup> As the jurisprudence of the European Court of Human Rights developed, however, it became apparent that British common law was no longer sufficient to vindicate rights under the Convention and incorporation would be necessary.<sup>413</sup> Accordingly, the United Kingdom formally incorporated the Convention into its domestic law in the year 2000.<sup>414</sup>

In the meantime, British citizens who felt the government was violating their human rights under the Convention had recourse to the European Commission of Human Rights and the European Court of Human Rights. Under the Convention, the Court of Human Rights is empowered to award money damages and declare that there has been a violation. In turn, the

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411. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention], available at <http://www.pfc.org.uk/legal/chrtext.htm>. The Council of Europe's Treaty Office maintains an on-line table that lists the dates of signature, ratification, and entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms for all member states of the Council of Europe. See generally Council of Europe, Treaty Office, *Complete List of Council of Europe's Treaties*, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

412. See HUMAN RIGHTS OFFICE, UNITED KINGDOM, SEC'Y OF STATE FOR THE HOME DEP'T, WHITE PAPER: RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997) [hereinafter WHITE PAPER], available at <http://www.archive.official-documents.co.uk>.

413. *Id.*

414. See Wing Commander Simon P. Rowlinson, *The British System of Military Justice*, 52 A.F. L. REV. 17, 20 (2002).

signatory nations are obligated to rectify any noted violations in their internal laws.<sup>415</sup>

Article Six of the Convention provides, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>416</sup> The celebrated case of *Findlay v. United Kingdom*<sup>417</sup> arose under this provision of the Convention. In 1991, Lance Sergeant Findlay pled guilty to charges of assault, conduct to the prejudice of good order and discipline, and threatening to kill.<sup>418</sup> He was sentenced by a court-martial to two years' confinement, reduction in rank, and dismissal.<sup>419</sup> His appeals through British military channels were denied, and in 1993, he filed a petition with the European Commission of Human Rights alleging that court-martial procedures under the Army Act 1955 and implementing regulations deprived him of an independent and impartial tribunal under Article 6(1) of the Convention. The Commission referred the case to the European Court of Human Rights.<sup>420</sup>

The Court found a violation of Article 6(1). In analyzing the independence of the court-martial, the Court looked to the manner of appointment of its members, their term of office, the existence of guarantees against outside pressure, and whether the body presented the appearance of impartiality. The test for impartiality employed a two-pronged analysis in which the court examined whether the tribunal was subjectively biased and whether it was impartial from an objective viewpoint. The court specifically stated that appearances were important in determining independence and impartiality.<sup>421</sup> Because the convening authority was superior in rank to all members of the panel and also acted as the confirming officer in reviewing the sentence, the Court found that the guarantees of independence and impartiality were not satisfied.<sup>422</sup> It is worth noting that the

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415. WHITE PAPER, *supra* note 412.

416. European Convention, *supra* note 411, art. 6, § 1.

417. 24 Eur. H.R. Rep. 221 (1997).

418. *Id.* paras. 6-10.

419. *Id.* para. 23.

420. *Id.* paras. 26-28, 58.

421. *Id.* para. 73.

422. *Id.* paras. 76-80.

United Kingdom had already legislatively changed its court-martial system by the time this case went to court.<sup>423</sup>

One wonders if *Findlay* would ever have made it to the Court of Human Rights had the British military justice system contained meaningful appellate rights. In an address at the U.S. Army Judge Advocate General's School, The Judge Advocate General of the Armed Forces of the United Kingdom commented that the European Commission, which certified the case to the Court of Human Rights, might have taken a different view had "the servicemember been permitted full rights of appeal to a higher civilian court."<sup>424</sup> The review system at the time had the following characteristics: no appeal to a judicial body if the accused pled guilty (as was the case in *Findlay*); the system of confirmation and reviews did not involve consideration by a legal body; the reviews were done in secret; the appellant could not participate in the reviews in any way; and there were no reasons given for denial of relief.<sup>425</sup>

*Findlay* did cause a change in British military justice. The convening authority no longer plays a role in the system. His former duties have been spread to three different bodies: a Prosecuting Authority, who determines whether to prosecute; a Court-Martial Administration Officer (CMAO), who sets the date and venue for the court-martial and personally selects the members using lists provided by various commanding officers; and Reviewing Officers, who now provide reasons for their decisions.<sup>426</sup> These changes have not ended controversy with the British system, but rather seem to have opened a Pandora's box in which judicial challenges to the legitimacy of the system are the order of the day.<sup>427</sup> In addition, the British military has experienced difficulty coping with the increased administrative burdens of the system and has had to adopt a centralized

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423. *Id.* paras. 66-67.

424. Judge James W. Rant, *The British Courts-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV. 179, 183 (1996).

425. Ann Lyon, *After Findlay: A Consideration of Some Aspects of the Military Justice System*, 1998 CRIM. L. REV. 109, 113. For an interesting comparison of rights under the UCMJ with the rights *Findlay* had under the British system, see Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001)*—"The Cox Commission," 52 A.F. L. REV. 233, 266 (2002). The authors created a table that provides a side-by-side comparison of the British and UCMJ systems. The UCMJ contains a number of statutory safeguards that ensure independence and impartiality, none of which were available in the British system. See generally *id.*

426. Lyon, *supra* note 425, at 115-17.

system for trying cases.<sup>428</sup> The British system tries about three hundred courts-martial per year compared to over 4500 in the American system.<sup>429</sup>

*b. The Canadian System and the Canadian Charter of Rights and Freedoms*

Canada's military justice system, like the United States system, had its roots in the British Articles of War.<sup>430</sup> Until the adoption of the Militia Act of 1868, which organized the Canadian Army,<sup>431</sup> the British Army operated in Canada. The Militia Act, in essence, adopted the British Articles of War. The British military justice system had both a direct and indirect effect on Canadian military justice through World War II, a situation that created a "confusion of authorities" that was remedied with the 1950 National Defense Act (NDA).<sup>432</sup> The NDA created a unified Code of Service Discipline for Canada's different services. This Code, like the UCMJ, has continued in force, although it has been modified from time to time.<sup>433</sup>

In 1982, Canada experienced a significant change in its domestic law with the adoption of the Canadian Charter of Rights and Freedoms.<sup>434</sup> Article 11(d) of the Charter guarantees that a person charged with an offense has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."<sup>435</sup> The language is remarkably similar to that in the European Convention on Human Rights and Fundamental Freedoms, and as will be

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427. See, e.g., Rowlinson, *supra* note 414, at 43 ("Indeed, it is accurate to say that the number of challenges to the reformed system have been greater in number than those to the system which existed prior to the reforms."). Rowlinson notes that many advocates are now attacking the changes as cosmetic only and failed to address the root causes of unfairness and bias in the system. *Id.* With respect to the particular issue of member selection, see John Mackenzie, *Who Really Runs the Court-Martial System*, 150 *NEW L.J.* 608 (2000). Mr. Mackenzie claims that the CMAO does not truly have the discretion to select court-martial members because he merely nominates the list provided to him by the chain of command. See *id.*

428. See JSC REPORT, *supra* note 32, app. M, at 7.

429. *Id.* at 43.

430. Brigadier-General Jerry S.T. Pitzul & Commander John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 *A.F. L. REV.* 1 (2002).

431. *Id.* at 3.

432. *Id.* at 4-5.

433. *Id.* at 7-8.

434. CAN. CONST. (Constitution Act, 1982), pt. I, Canadian Charter of Rights and Freedoms, c. 11 (LEXIS 2002) [hereinafter Canadian Charter].

435. *Id.* § 11(d).

seen, the Canadian Supreme Court adopted an analysis similar to the one later used by the European Court of Human Rights in *Findlay*.

The seminal case that changed the Canadian military justice system was *R. v. Genereux*,<sup>436</sup> a 1992 case in which a corporal in the Canadian armed forces appealed his general court-martial conviction for drug trafficking and desertion. The main ground for appeal was that a military tribunal did not constitute an independent and impartial tribunal within the meaning of section 11(d) of the Charter.<sup>437</sup>

The Supreme Court of Canada took a broad look at the Canadian military justice system in concluding that it violated the Canadian Charter. The guarantees of independence and impartiality were, as in *Findlay*, analyzed not according to actual bias, but according to an objective standard that measured whether a reasonable person would perceive the tribunal as independent.<sup>438</sup> There were three factors required for judicial independence: security of tenure, financial independence, and institutional independence.<sup>439</sup> The Court found that the Canadian general court-martial of the day violated the Charter in several respects.<sup>440</sup> The Court also found that certain aspects of the court-martial could cast into doubt the institutional independence of the proceedings, in particular the role of the convening authority, who decided when a court-martial would take place, appointed the members of the court, and appointed the prosecutor.<sup>441</sup>

As a result of this opinion, Canada implemented a number of legislative changes to its system of military justice. The convening authority no longer has the authority to appoint judges and panel members.<sup>442</sup> The

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436. [1992] S.C.R. 259.

437. *Id.* at 259.

438. *See id.* at 286.

439. *Id.* at 301.

440. *See id.* at 303-06. Most of the factors are not directly relevant to this article. The Court found that the structural position of The Judge Advocate General as an agent of the executive was troubling. He had the power to appoint military judges. Their security of tenure was affected by the ad hoc nature of the tribunal and the fact that their promotions, and hence, financial security, could be dependent on good performance evaluations. "A reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive." *Id.* Financial security was an issue both for the judge and the members of the court. At the time, there were no formal prohibitions against evaluating an officer on the basis of his performance at a court-martial. This could potentially result in negative evaluations, and therefore, lower promotion opportunities. *See id.* at 305-06.

441. *Id.* at 308-09.

prosecution function has been centralized and assigned exclusively to the Director of Military Prosecutions.<sup>443</sup> Canada has adopted a modified random selection methodology for appointing court members based on rank, and panels are appointed centrally under the direction of the Chief Military Trial Judge. All officers meeting the rank criteria in the Canadian armed forces, with the exception of chaplains, legal officers, security officers, officers from the accused's unit, and witnesses, are eligible to serve.<sup>444</sup>

The very first use of the system demonstrated the potential difficulties of a centralized selection system when the computer selected the military attaché in Malaysia as the president of a general court-martial in eastern Canada.<sup>445</sup> Centralized selection could hamstring the much larger United States system. The Canadian system does not deal with nearly the volume of the United States system. For example, Canada convened only twenty general courts-martial between 1994 and 1998.<sup>446</sup>

*c. (In)Applicability of the British and Canadian Models to the U.S. Constitutional Framework*

The changes to the British and Canadian systems have little bearing on military justice in the United States. Both countries modified their military justice systems only after making major changes in their domestic charters governing human rights and freedoms. Neither country changed its military justice system spontaneously; both countries waited until legal challenges made it clear their military justice systems did not meet the new charter obligations as interpreted by applicable jurisprudence.

Although the common ancestry of the three systems is the same, the United States took a radical departure from the Commonwealth system at the American Revolution. From the beginning, the court-martial system was placed under the firm control of the legislative branch, which was given the enumerated power to make regulations to govern the military.<sup>447</sup> The structural placement of courts-martial within the U.S. system determines the degree of judicial independence they will receive and due process rights they will accord. As legislative courts, they must offer

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442. Pitzul & Maguire, *supra* note 430, at 8.

443. *Id.* at 12.

444. JSC REPORT, *supra* note 32, app. M, at 2.

445. *Id.* at 3.

446. *Id.* at 1.

447. *See supra* notes 145-46 and accompanying text.

fundamental due process and such other protections as Congress may statutorily provide.<sup>448</sup> Legislative courts are not constitutionally required to provide all the protections of an Article III court; indeed, such protections would be inimical to their existence, for, as one scholar has observed, “Article III litigation is a rather grand and very expensive affair,” cumbersome and inefficient.<sup>449</sup> The very nature of a legislative court involves a compromise between individual rights and Congress’s ability to exercise its enumerated powers under the Constitution.

Thus, it is important to avoid the superficial appeal of changing the U.S. military justice system merely because America’s close allies have done so. Their governing charters require all criminal tribunals to use the same standards. In contrast, the U.S. constitutional structure of government places courts-martial on a different footing than civilian tribunals. So long as Congress continues to exercise its enumerated constitutional power to provide for the government of the armed forces, the military justice system will necessarily be subject to a different standard than that employed in the Article III federal courts.

### C. Changing the Rules Through Judicial Activism

#### *1. The Strategy: Use the Implied Bias Doctrine to Change the Rules for Panel Member Selection*

In recent months, an activist majority of the CAAF has opened a new front in the war against discretionary convening authority selection of panel members. *United States v. Wiesen*<sup>450</sup> demonstrates that the CAAF majority is willing to use the court’s implied bias doctrine in a way that effectively rewrites UCMJ Article 25(d)(2), burdening convening author-

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448. *See supra* Section II.D.

449. Bator, *supra* note 225, at 262.

450. 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2001). The accused in *Wiesen* was convicted by a general court-martial comprised of officer and enlisted members of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice. He was sentenced to a dishonorable discharge, twenty years’ confinement, total forfeitures of pay and allowances, and reduction to the grade of E-1. *Id.* at 172.

ities with a requirement to consider actual and potential command and supervisory relationships when appointing panel members.

The issue in *Wiesen* involved a defense challenge for cause on the court-martial president, Colonel (COL) Williams, who commanded the 2d Brigade of the 3d Infantry Division (Mechanized) at Fort Stewart, Georgia. Voir dire revealed that COL Williams had either an actual or potential command relationship over six other members of the panel.<sup>451</sup> All together, those members and COL Williams formed the two-thirds majority necessary to convict the accused.<sup>452</sup> The military judge thoroughly explored the issue of potential bias on the record. The court-martial president and all other panel members stated on the record, under oath, that this senior/subordinate relationship would not affect their ability to deliberate and vote.<sup>453</sup> The defense counsel challenged COL Williams for cause on the grounds of implied bias. Based on the answers to voir dire questions and, undoubtedly, his observation of the demeanor of the members, the military judge

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451. *Id.* at 175. Colonel Williams had direct authority over four members of the panel who were part of his brigade: two battalion commanders, a battalion executive officer, and a company first sergeant. Two other members of the panel—a forward support battalion commander and his command sergeant major—were from his brigade combat team (BCT). In an Army division, major subordinate commands include maneuver brigades (such as armor or mechanized infantry brigades), a divisional artillery brigade, a brigade-size division support command, and other units. A maneuver brigade typically consists of three battalions. When a maneuver brigade deploys, other divisional units are attached, or “sliced” to it to form a BCT. Those units, which include artillery and forward support battalions, may train with the maneuver brigade, but are not part of its command structure in a garrison environment. Thus, in garrison, COL Williams would only directly command, supervise, and rate members of his maneuver brigade. The forward support battalion commander and sergeant major would be commanded and rated by the commander of the division support command. In its petition for reconsideration, the government alleged that the CAAF had not paid sufficient attention to the actual command and supervisory arrangements at Fort Stewart. In denying the petition for reconsideration, the majority seemed to suggest that it didn’t care: “Although our opinion did not comment on the specifics of each supervisory relationship or the operational status of each brigade at Fort Stewart, *those particular facts were not critical to our finding that the military judge abused his discretion in denying the challenge for cause.*” *United States v. Wiesen*, 57 M.J. 48, 49 (2002) [hereinafter *Wiesen II*] (emphasis added).

452. *Wiesen*, 56 M.J. at 175.

453. *Id.*

denied the challenge.<sup>454</sup> The defense counsel used a peremptory challenge on the panel president to preserve the issue for appeal.<sup>455</sup>

On appeal, the Army Court of Criminal Appeals (ACCA) affirmed.<sup>456</sup> Over vigorous dissents from Chief Judge Crawford and Senior Judge Sullivan,<sup>457</sup> Judge Baker, writing for a bare majority of the CAAF, reversed, holding that the military judge had abused his discretion in denying the challenge for cause.<sup>458</sup> The majority found that “where a panel member has a supervisory position over enough other members to make up the two-thirds majority necessary to convict, we are placing an intolerable strain on public perception of the military justice system.”<sup>459</sup> Because of the potential impact on the military justice system, the government petitioned for reconsideration. In a per curiam opinion, the same majority denied the petition, again over the separate dissents of Judges Crawford and Sullivan.<sup>460</sup>

The foundation for the majority’s opinion was the CAAF’s implied-bias doctrine, derived from Rule for Courts-Martial (R.C.M.)

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454. *Id.* at 174.

455. *Id.* Rule for Courts-Martial 912(f)(4) requires that the challenging party preserve denied challenges for cause by using a peremptory challenge against the denied individual:

[W]hen a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issues for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MCM, *supra* note 8, R.C.M. 912(f)(4). The real irony of *Wiesen* is that the panel that eventually convicted and sentenced the accused to twenty years’ confinement no longer included COL Williams.

456. *Wiesen*, 56 M.J. at 177 (noting that the decision of the ACCA is reversed). There is no ACCA opinion available in *Wiesen*.

457. Judge Crawford’s dissent focused on two primary areas: (1) the disconnect between the CAAF’s implied bias doctrine and the fundamentally different implied bias doctrine in the federal courts; and (2) the weaknesses of the majority’s perception of the American public. *See id.* at 177-81 (Crawford, C.J., dissenting). Judge Sullivan’s dissent criticized the majority for invading the province of Congress and the President by, in effect, engaging in judicial legislation or judicial rulemaking. *See id.* at 181-85 (Sullivan, J., dissenting).

458. *Id.* at 174.

459. *Id.* at 175.

460. *Wiesen II*, 57 M.J. 48, 50 (2002).

912(f)(1)(N), which provides that a member shall be excused for cause “whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”<sup>461</sup> As developed by the CAAF’s case law over the years, the doctrine seeks to “view the situation [as to whether a member should sit] through the eyes of the public, focusing on the appearance of fairness.”<sup>462</sup> This is a nebulous standard at best, and one that in the *Wiesen* majority’s own words, the CAAF has “struggled to define . . . or just disagreed on what that scope should be.”<sup>463</sup> *Wiesen* demonstrates that the struggle continues.

The *Wiesen* majority opinion fails to provide an objective, coherent analytical framework for analyzing implied bias. Without providing any standards for determining how to view the case “through the eyes of the public,” the majority simply strung together a series of speculative statements on its perceptions of public opinion. The majority believes that the public trusts the integrity of military officers to abide by their oaths, in and out of the deliberation room. The problem is that the public, which understands that military personnel lead, command, and follow each other, might wonder to what extent institutional military deference for senior officers would come into play in the deliberation room. When a senior officer supervises a high enough percentage of the panel, it establishes “the wrong atmosphere,” creating “simply too high a risk that the public will perceive that the accused received something less than a jury of ten equal members, although something more than a jury of one.”<sup>464</sup> Nothing in the opinion assists military justice practitioners in determining how to measure public perception of the justice system; there is not, for example, a

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461. MCM, *supra* note 8, R.C.M. 912(f)(1)(N).

462. *United States v. Rome*, 47 M.J. 467, 469 (1998).

463. *Wiesen*, 56 M.J. at 175.

464. *Id.* at 176.

“reasonable person” test of the kind so familiar in American appellate jurisprudence.<sup>465</sup>

The majority further complicated matters for the practitioner by shifting the burden of proof for causal challenges of panel members based on implied bias from the accused to the government. The normal burden of proof for causal challenges is on the party making the challenge.<sup>466</sup> The majority in *Wiesen* adopted a standard requiring the government to demonstrate the necessity for the challenged member to serve on the panel because of “operational deployments or needs.”<sup>467</sup>

2. *Response: The Theoretical Shortcomings and Practical Drawbacks of Wiesen*

The *Wiesen* majority opinion reveals the limitations of an appellate court in determining public opinion. Without fact-finding ability, investigative resources, or a constituency to provide input,<sup>468</sup> an appellate court is left to its imagination in trying to determine how the public might view a particular practice in the military justice system. Most critically, an appellate court has no way to measure the impact of its decisions on the military; this is one of the primary reasons for the military deference doctrine in the Article III courts.<sup>469</sup> When an appellate court ventures into the

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465. Indeed, Chief Judge Crawford made this point in her dissent in the denial of the government’s petition for reconsideration. She stated that implied bias should be measured by the “long-standing legal standard of the ‘reasonable person test.’ A ‘reasonable person’ is a person ‘knowing all the facts’ and circumstances surrounding the issue in the case, including the rationales of the UCMJ and the Manual for Courts-Martial.” *Wiesen II*, 57 M.J. at 54 (Crawford, C.J., dissenting). The public of the *Wiesen* majority’s opinion is ignorant, uninformed, opinionated, and reactionary.

466. See MCM, *supra* note 8, R.C.M. 912(f)(3).

467. *Wiesen*, 56 M.J. at 176. The majority’s language on the issue is quite clear: “Here, deployed units may have diminished the potential pool of members, but the Government failed to demonstrate that it was necessary for the Brigade Commander to serve on this panel.” *Id.* In its denial of the government’s petition for reconsideration, the majority stated it had never shifted the burden, but had merely suggested that the government could have used these factors in rebuttal to demonstrate the necessity of the Brigade Commander’s service. *Wiesen II*, 57 M.J. at 49. The majority undercut this assertion in the next paragraph, however, when it stated, “Notwithstanding the operational requirements at the time, there remained ample officers at Fort Stewart from which to select a member other than the Brigade Commander.” *Id.* at 50. While this might, perhaps, have been true, UCMJ Article 25(d)(2) leaves that decision to the convening authority, not the CAAF.

domain of the legislature, the consequences to the military can be particularly serious:

A mistaken judicial conclusion that servicemen's individual rights can be protected without impairing military efficiency has the court do inadvertently what it has no standard for doing deliberately. *Because the uses to which the armed forces are put cannot be judged by the principles of the legal system, mistaken balancing that impairs those uses is not offset by vindication of the hierarchy of values within the system.*<sup>470</sup>

Issues of court-martial panel composition fall squarely within the legislative purview of Congress and the rule-making authority of the President.<sup>471</sup> As Judge Crawford noted in her dissent to the CAAF's denial of reconsideration in *Wiesen*, Congress made all commissioned officers eligible to serve on court-martial panels, making no exclusion for officers rated by another member of the panel.<sup>472</sup> In his dissent, Judge Sullivan was even more specific:

Congress *could have provided* that a member shall be disqualified if he or she is a military commander of a significant number of the members of the panel. Congress has been aware that, for years, commanders have sat on panels with their subordinates. *Congress could have prohibited this situation by law but failed to do so.* A court should not judicially legislate when Congress, in its wisdom, does not.<sup>473</sup>

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468. Cf. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 68-84 (1997). Mikva and Lane point out that three primary factors make the legislative process legitimate: (1) deliberativeness, or the structures and steps of the process that slow legislative decision-making and remove it from the passions, immediacy, and prevailing desires of legislators or constituencies; (2) representativeness, which requires legislators to stay in touch with the people they represent; and (3) accessibility, which guarantees an open legislative process. *Id.* Through the use of committees and hearings, the legislature is able to investigate and gather information from a wide variety of sources regarding the impact and scope of proposed legislation. *See id.* at 90-94. In addition, legislators have significant staff resources available to assist them. *See id.* at 95.

469. *See supra* note 271 and accompanying text.

470. Hirshhorn, *supra* note 267, at 238.

471. *See* UCMJ art. 36 (2002) (establishing presidential authority to make rules of procedure for courts-martial).

472. *See Wiesen II*, 57 M.J. at 53 (Crawford, C.J., dissenting).

473. *Id.* at 182 (Sullivan, J., dissenting) (emphasis added) (citations omitted).

What the CAAF majority accomplished in *Wiesen* was a judicial revision of UCMJ Article 25(d)(2). Article 25(d)(2) requires a convening authority to select best-qualified members by criteria of age, experience, education, training, length of service, and judicial temperament. In effect, *Wiesen* has rewritten Article 25(d)(2), adding a new clause that never existed before requiring convening authorities to consider, in addition to—or more likely in spite of—the statutory provisions of Article 25(d)(2), “all the potential command and supervisory relationships of panel members in conjunction with final panel size and numbers needed for conviction.” Furthermore, *Wiesen* has significantly changed the rules regarding challenges in implied bias cases, imposing new requirements on the government to be prepared to justify panel selections in the light of operational needs.

Thus, *Wiesen* has a debilitating effect on the convening authority’s discretion in panel selection. No longer may a convening authority select those whom he believes to be best qualified based on age, education, experience, training, length of service, and judicial temperament. Now he must consider the interrelationships among candidate panel members, particularly what potential command and supervisory arrangements may exist.<sup>474</sup> This potentially destroys a commander’s authority to convene courts-martial in smaller commands, isolated installations, aboard ships, or in a deployed environment.<sup>475</sup>

There should be no doubt that the *Wiesen* majority intended to strike a blow at the convening authority’s discretionary ability to appoint court-martial panel members. In the penultimate sentence of its per curiam denial of the government’s petition for reconsideration, the majority wrote, “The issue is appropriately viewed in the context of public perceptions of a system in which the commander who exercises prosecutorial discretion is the official who selects and structures the panel that will hear the

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474. As of yet, there is no empirical evidence on the impact of *Wiesen* on the field; however, in an information paper, the Criminal Law Division of the Army Office of The Judge Advocate General noted that with the increased operational tempo of the Army and other services (at present, the Armed Services are engaged in combat in Iraq and Afghanistan), *Wiesen* is a “crippling precedent.” Information Paper, Criminal Law Division, United States Army, Office of The Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) [hereinafter OTJAG Information Paper] (on file with author). An alternative view is that *Wiesen* is merely a voir dire case that primarily places the burden on counsel and the bench to ensure that a panel never contains a majority sufficient to convict from the same chain of command. See Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20, 37.

case.”<sup>476</sup> The *Wiesen* majority’s true policy concern, then, hearkens back to the objections that Congress heard and considered when enacting the UCMJ over fifty years ago. Viewed in that context, *Wiesen* is a prime example of an activist appellate court arrogating to itself the power to change constitutionally sound legislation with which it does not agree.<sup>477</sup>

#### IV. Counterattack: A Proposal to Solve the Problems of *Wiesen* and Shape the Future Debate on Convening Authority Panel Selection

This section proposes a two-phase strategy to aggressively counter efforts to remove the convening authority from panel member selection. The first phase, the “close fight,”<sup>478</sup> involves taking steps to solve the prob-

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475. Judge Crawford pointed to the potential impact of *Wiesen* on operations:

The logical extension of the majority’s view will make it very difficult for a deployed convening authority of a detached brigade, separate battalion, or units of similar size to convene a court-martial. This not only defeats the flexibility for which the UCMJ has provided since its inception, but also undermines good order and discipline in the armed services. If the commander of a brigade, separate battalion, or units of similar size of soldiers currently deployed in Asia wanted to convene a court-martial, he or she may practically be precluded from doing so without going outside the unit or changing venue. Either may impact on the mission.

*Wiesen II*, 57 M.J. at 55 (Crawford, C.J., dissenting).

476. *Id.* at 50.

477. Indeed, the majority’s language also damns them in this matter. In an acid footnote responding to Judge Sullivan’s dissent in the original opinion, the majority dismissed his concerns, cited *Marbury v. Madison*, and tartly observed, “The duty of judges is to say what the law is.” *Wiesen*, 56 M.J. at 177 n.5. In fact, *Marbury* says, “It is, emphatically, the province and duty of the judicial department, to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). *Marbury* has never been a blank check to authorize appellate courts to rewrite statutes at their whim. Moreover, to paraphrase Lawrence Tribe, *Marbury* generally stands for the proposition that a federal court has power to refuse to give effect to congressional legislation if it is inconsistent with the Court’s interpretation of the Constitution. See TRIBE, *supra* note 221, § 3-2, at 23. It is highly unlikely that *Marbury* means an Article I court can “say what the law is” by, in effect, adding new requirements to congressional legislation when no constitutional issues have been raised.

478. According to U.S. Army doctrine, close operations, or the “close fight,” are those in which forces are “in immediate contact with the enemy and the fighting between the committed forces and the readily available tactical reserves of both combatants.” U.S. DEP’T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND GRAPHICS 1-28 (30 Sept. 1997) [hereinafter FM 101-5-1].

lems created by the CAAF in *United States v. Wiesen*. This can be done most effectively using the rule-making authority Congress granted the President in Article 36 of the UCMJ.<sup>479</sup> The second phase, “the deep fight,”<sup>480</sup> recognizes that defenders of the current system cannot hope to prevail in a public debate in which the military justice system is subjected to misleading and incomplete comparisons with the civilian criminal justice system. The solution is to change the terms of the debate, pointing out the purposes of military justice, its historical and constitutional validity, and most importantly, the benefits to the military and the accused of a system in which the convening authority uses his discretion to select a panel of the most highly qualified members of his command.

#### A. The Close Fight: Wrestling with *Wiesen*

As previously mentioned, the CAAF’s decision in *Wiesen* has been, thus far, the most effective contemporary attack against the convening authority’s role because the CAAF exercises an important supervisory role over the military justice system.<sup>481</sup> Its opinions are entitled to great deference, and history has demonstrated that commanders and Staff Judge Advocates will change their military justice practices to satisfy the standards handed down by the CAAF. But the CAAF exceeds its jurisdictional mandate when its decisions usurp functions that belong to other branches of government.<sup>482</sup> In this case, the effect of the CAAF’s decision is to

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479. See UCMJ art. 36 (2002).

480. Deep operations, or “the deep fight,” “employ long-range fires, air and ground maneuver, and command and control warfare to defeat the enemy by denying him freedom of action; disrupting his preparation for battle and his support structure; and disrupting or destroying the coherence and tempo of his operations.” FM 101-5-1, *supra* note 478, at 1-47. The purpose of deep operations is to shape the battlefield for future operations. *Id.*

481. See *supra* Section III.C.

482. The CAAF has overreached before. A few years ago, the CAAF attempted to use the All Writs Act to enjoin the Secretary of the Air Force from dropping an Air Force officer from the rolls. The Supreme Court ruled that the CAAF did not have the authority under the All Writs Act to enjoin the Secretary of the Air Force from taking an administrative personnel action against an Air Force officer. The All Writs Act could not give the CAAF jurisdiction it did not have. See *Clinton v. Goldsmith*, 526 U.S. 529 (1999). Writing for the majority, Justice Souter noted that Congress had limited the CAAF’s jurisdiction to act only with respect to review of sentences imposed by courts-martial. *Id.* at 534.

impose a new statutory element on UCMJ Article 25(d)(2), a function that belongs not to an appellate court, but to Congress.

There are several potential responses to *Wiesen*. The first is simply to accept it, and either make appropriate modifications to panel selection procedures, or place the burden on trial counsel to avoid *Wiesen* problems during the voir dire and challenges phase of trial.<sup>483</sup> The second is for the government to seek certiorari from the Supreme Court.<sup>484</sup> A third option is for the President to use his rule-making authority under UCMJ Article 36 to amend R.C.M. 503(a) and R.C.M. 912(f)(1)(N), making clear his intent that command and supervisory relationships are no impediment to a convening authority's discretion in appointing panel members.<sup>485</sup> This section discusses each of these options in turn.

*1. Option One: Accept Wiesen and Its Effects on Military Justice System*

Under this option, the military would accept the results of *Wiesen* and modify its practices accordingly. Some jurisdictions would read the case as limiting the convening authority's discretion in appointing panel members and create mechanisms to ensure no panels would suffer from a potential *Wiesen* problem. Other jurisdictions would make no changes to panel selection procedures, instead viewing *Wiesen* simply as a voir-dire-and-challenges case<sup>486</sup> and placing the burden on trial counsel to be especially vigilant during the voir dire phase of a court-martial, joining in defense challenges for cause to ensure that the final composition of any panel would not violate the *Wiesen* rule that the two-thirds majority of the panel necessary to convict could not fall under the potential command or supervision of the panel president.

The fallacy of simply accepting *Wiesen* is that either of the above approaches will damage the military justice system. In jurisdictions that view *Wiesen* as applying to the selection and appointment of court-martial panels, similar issues may never arise at trial because the panels will already have been screened, shuffled, and sifted to comply with *Wiesen*.

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483. See discussion *infra* Section IV.A.1.

484. See discussion *infra* Section IV.A.2.

485. See discussion *infra* Section IV.A.3.

486. Indeed, there is by no means universal agreement that *Wiesen* sounds the death knell for the commander's role in the military justice system. Some, in fact, view *Wiesen* primarily as a voir dire case. See Huestis, *supra* note 474, at 37.

However, the paucity of such issues will stem not from the inherent virtues of *Wiesen*, but because of the limiting effect the case has on a convening authority's discretion. The price to be paid is judicial evisceration of the UCMJ Article 25(d)(2) subjective selection criteria.

Jurisdictions that do not change panel selection procedures to comply with *Wiesen* will be vulnerable to creative defense strategies during voir dire and challenges. For example, taking advantage of the CAAF's mandate that trial judges should liberally grant challenges for cause,<sup>487</sup> a defense counsel could selectively challenge panel members, shaping the panel so it violates *Wiesen* even as it approaches minimum quorum requirements.<sup>488</sup> At that point, the defense could make an additional challenge for cause because of the *Wiesen* problem its earlier challenges created.<sup>489</sup> If the granted challenge reduces the panel to its minimum for a quorum, the defense could potentially "bust" the panel by exercising a

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487. See *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993) (instructing military judges to grant defense challenges for cause liberally).

488. This would not be especially difficult to do. The following hypothetical presents just one of many possible panel arrangements that would be potentially vulnerable to manipulation by defense counsel. Assume that Fort Hypothetical has two major subordinate commands, A Brigade and B Brigade, each commanded by an O-6. Suppose that the commanding general of Fort Hypothetical appoints a ten-member officer-and-enlisted general court-martial panel. For each rank represented on the panel, there is one member from A Brigade and one member from B Brigade. No members of the court-martial panel are from the same battalion. The panel consists of two O-6 brigade commanders, two O-5 battalion commanders, two O-4 battalion staff officers, two E-9 battalion command sergeants major, and two E-8 company first sergeants. At PFC Snuffy's general court-martial for several counts of barracks larceny, the defense counsel is aware of *Wiesen* and plans her strategy accordingly. She challenges the commander of A Brigade for cause because PFC Snuffy is a member of A Brigade and the commander had read the blotter report, appointed an Article 32 investigation, and forwarded the charges with a recommendation for disposition. She challenges the battalion commander from A Brigade because in past dealings with her, the commander had formed a negative opinion of her advocacy and had complained about her to the installation chief of justice. She challenges a sergeant major from A Brigade because he knew about the offense, had formed an opinion concerning the accused's guilt, and had sent an E-mail to the other sergeants major in the brigade warning them to watch out for barracks thieves. She challenges a first sergeant from B Brigade because of what she perceives as his inflexible attitude towards the offense of barracks larceny. Using the liberal grant mandate, the judge grants the four challenges, leaving a six-member panel. The panel president is the O-6 B Brigade commander. Also from B Brigade are an O-5 battalion commander, an O-4 battalion staff officer, and an E-9 battalion command sergeant major. The remaining members are an O-4 staff officer and an E-8 first sergeant from A Brigade. The B Brigade commander is in the rating chain for each of the B Brigade members (rater for the battalion commander, senior rater for the battalion staff officer and the command sergeant major). The panel now violates *Wiesen* because four of its six members (the two-thirds majority necessary to convict) are part of the panel president's rating chain.

peremptory challenge on one of the remaining members. If the challenge is denied, defense could preserve the issue for appellate review by exercising a peremptory challenge against the senior member of the panel.<sup>490</sup> Either way, the government loses. Jurisdictions that ignore *Wiesen* when selecting and appointing panel members may well see it come back to haunt them later in the form of “busted” panels or, possibly, reversals and re-hearings. The cost to the system in terms of efficiency and utility to the command could prove onerous. At smaller installations or aboard ship, the system could grind to a halt.

In time, the CAAF itself could limit *Wiesen* to its facts or otherwise distance itself from the opinion. As the development of the CAAF’s implied bias doctrine demonstrates,<sup>491</sup> however, *Wiesen* will likely become the basis for further encroachments on a convening authority’s discretion. Implied bias based on potential rating schemes could morph into implied bias based on the position or seniority of panel members. For example, if a convening authority seeks to avoid *Wiesen* problems by appointing his chief of staff to panels in lieu of senior O-6 commanders,<sup>492</sup> one can easily imagine the court expanding the implied bias doctrine to include individuals who serve as the “alter ego” or right-hand-man to the commander. The

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489. The R.C.M. specifically permits challenges for cause even after initial examination and challenges of the members, providing that “[a] challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.” MCM, *supra* note 8, R.C.M. 912(f)(2)(B). Thus, if a *Wiesen* problem arises only after the exercise of challenges for cause pursuant to R.C.M. 912(f)(2)(A), counsel would be able to raise the issue at that point.

Returning to the Fort Hypothetical case, *supra* note 488, the government’s problem becomes apparent. The defense counsel could now challenge the panel president for cause. The government, in fact, could join in the challenge for cause to avoid the *Wiesen* issue. If the challenge is successful, the panel now contains five members and the defense counsel, with her peremptory challenge intact, can “bust” the panel and force the convening authority to detail new members. MCM, *supra* note 8, R.C.M. 505(c)(2)(B). If she loses, the defense counsel can preserve the issue for appeal by using her peremptory challenge on the brigade commander.

490. See MCM, *supra* note 8, R.C.M. 912(f)(4) (quoted *supra* note 455).

491. Over the course of five years, the CAAF went from questioning whether its version of the implied bias doctrine even existed, see *United States v. Dinatale*, 44 M.J. 325, 329 (1996) (Cox, C.J., concurring) (“I write only to question if there is such a thing as ‘implied bias.’”), to enshrining it as a well-established principle of military jurisprudence, see *United States v. Rome*, 47 M.J. 467, 469 (1998) (stating that R.C.M. 912 includes both actual and implied bias), to using the doctrine to create the result in *Wiesen*.

492. Typically, an installation or division chief of staff would not be in the rating chain for officers and enlisted from the major subordinate commands.

court could also invalidate a panel that included too many O-6 commanders because of their tendency to outrank, take charge of, lead, and be granted deference to by lower-ranking members of the panel.<sup>493</sup> Because *Wiesen* lacks a coherent analytical framework, its potential scope is limited only by the unique fact patterns arising in various jurisdictions and the creativity of defense counsel in raising novel challenges.

## 2. Option Two: Seek Certiorari from the Supreme Court

Article 67a of the UCMJ permits either the government or the accused to seek review of CAAF decisions by writ of certiorari.<sup>494</sup> The government could apply for a writ of certiorari, seeking to invalidate the CAAF's implied bias doctrine as applied in *Wiesen*. If the government was successful both in obtaining the writ and on appeal, the authority and finality of a Supreme Court ruling invalidating the CAAF's implied bias doctrine would go a long way toward preserving the practice of discretionary convening authority appointment of court-martial panel members.

There are two potential drawbacks associated with this course of action. The first is that the Court could refuse, without explanation, to grant certiorari. Although this would not have the legal effect of affirming the CAAF's decision in *Wiesen*,<sup>495</sup> as a practical matter, a denial of certiorari would help buttress the opinion. The government, having expended

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493. This result would be entirely consistent with the *Wiesen* majority, which seemed concerned that an objective public might ask to what extent deference for senior leaders comes into play in the deliberation room. "The public perceives accurately that military commissioned and noncommissioned officers are expected to lead, not just manage; to command, not just direct; and to follow, not just get out of the way." *United States v. Wiesen*, 56 M.J. 172, 176 (2001).

494. UCMJ Article 67a (2002). Article 67a, UCMJ, states:

- (a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of Title 28. The Supreme Court may not review by a writ of certiorari under this section any action by the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

*Id.*

495. Because a writ of certiorari is discretionary, a denial of certiorari generally carries no implication whatsoever regarding the Court's view of the merits of the case on which it has denied review. *TRIBE, supra* note 221, at 44 n.9 (quoting *Maryland v. Baltimore Radio Show, Inc.*, 333 U.S. 912, 917-19 (1950)).

the energy and political capital to petition for certiorari,<sup>496</sup> would not likely try again on a similar issue absent an especially compelling set of facts. On the other hand, a denial of certiorari could serve to embolden the CAAF, ultimately leading to further expansion of the implied bias doctrine and additional judicially created limitations on the subjective selection criteria of UCMJ Article 25(d)(2).

The second problem is potentially the most dangerous: The Court could grant certiorari and affirm *Wiesen*. This could occur due to the Court's long-standing practice of settling issues on the narrowest grounds possible.<sup>497</sup> Although *Wiesen* has a potentially deleterious effect on the commander's role in the military justice system, there is no developed record or empirical evidence to demonstrate that effect, and one could not be created merely for the sake of a Supreme Court appeal. All issues related to impact on the system or *Wiesen*'s practical effect of rewriting UCMJ Article 25(d)(2) would have to be presented as hypothetical problems and could run afoul of the Court's practice of avoiding advisory opinions.<sup>498</sup>

Furthermore, the CAAF has framed its implied bias doctrine not as an issue of statutory interpretation, but rather as a natural outgrowth of the Rules for Courts-Martial, which permit challenges if a member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."<sup>499</sup> On the nar-

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496. The services do not have direct access to the Supreme Court. They must first persuade the Solicitor General, by way of the Department of Defense General Counsel, to take the case. See ROTUNDA & NOWAK, *supra* note 251, § 2.2 (discussing the role of the Solicitor General). By law, only the Solicitor General or his designee can conduct and argue cases in which the United States has an interest before the Supreme Court. *Id.* (citing 28 U.S.C.A. § 518(a)). Consequently, the military does not lightly seek certiorari from the Court. Cf. E-mail from Major Bradley Huestis, Professor, The Judge Advocate General's School, U.S. Army, to author (25 Nov. 2002) [hereinafter Huestis E-mail] (containing a string of E-mail traffic in which the various participants in the process of trying to obtain certiorari discuss the *Wiesen* case) (on file with author).

497. See ROTUNDA & NOWAK, *supra* note 251, § 2.13 (discussing the Court's desire to settle issues on the narrowest possible grounds to avoid having to decide constitutional issues).

498. According to Rotunda and Nowak, the Court declines to give advisory opinions for four primary reasons. First, they may not be binding on the parties. Second, advisory opinions undermine the basic theory behind the adversary system. Third, advisory opinions unnecessarily force the Court to reach and decide complex constitutional issues. Fourth, the power to render advisory opinions is thought to be beyond the scope of what the Framers intended. See *id.*

499. MCM, *supra* note 8, R.C.M. 912(f)(1)(N).

row issue of whether the CAAF's implied bias doctrine effectuates the President's intent to hold fair and impartial courts-martial, it is quite possible that the Court could defer to the CAAF's judgment on the matter and affirm. Such an opinion would substantially limit the military's options for overcoming *Wiesen*.

Of the three possible outcomes of a petition for certiorari, the two most likely to occur are the least desirable from the government's point of view. The third—a grant of certiorari followed by a favorable ruling—is not worth risking the other two possibilities.

### 3. *Option Three: Change the Manual for Courts-Martial*

Because the CAAF has based its implied bias doctrine on the Rules for Courts-Martial rather than employing a statutory or constitutional analysis, the best option for overruling *Wiesen* is to change the Rules. If the President clearly expresses a policy that command and supervisory relationships neither disqualify members from sitting nor form the basis for a viable challenge for cause, the CAAF will be forced either to retreat from its implied bias doctrine or shift the basis of its analysis to a constitutional or statutory interpretation. Should that occur in a future case, the government would be in a better position to seek certiorari and prevail at the Supreme Court.

Congress has specifically granted the President the authority to promulgate procedural and evidentiary rules for courts-martial in Article 36 of the UCMJ.<sup>500</sup> There is, furthermore, a strong argument that the President has the inherent power to promulgate such rules stemming from his constitutional authority as Commander in Chief of the armed forces.<sup>501</sup> In Articles 18 and 56 of the UCMJ, Congress has also authorized the Presi-

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500. UCMJ art. 36(a) (2002). Article 36(a), UCMJ, provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

*Id.*

dent to set maximum punishment limits for violations of the punitive articles of the UCMJ.<sup>502</sup> The rules and punishment limitations prescribed by the President are contained in the *Manual for Courts-Martial (Manual)*.<sup>503</sup>

The *Manual* consists of five parts, including a Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles of the UCMJ, that have been created through executive orders in accordance with the President's Article 36 authority.<sup>504</sup> These provisions of the *Manual* are binding on court-martial practice. In addition, the *Manual* contains a number of supplementary materials, including discussion paragraphs and sections analyzing the Rules for Courts-Martial and the Military Rules of Evidence, which have been prepared by the Departments of Defense and Transportation.<sup>505</sup> The supplementary materials create no binding rights or responsibilities, but are a useful reference tool for practitioners and are helpful in determining the intended meaning or effect of a *Manual* provision.<sup>506</sup>

The process of amending the *Manual* is relatively simple. If the President desires to change or clarify the *Manual for Courts-Martial*, he does so by executive order.<sup>507</sup> The President has, in fact, frequently amended

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501. See U.S. CONST. art. II, § 2; see also Captain Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 100-01 (1999) (discussing the statutory and constitutional basis for presidential rule-making authority and observing that the President directed the conduct of courts-martial in the nineteenth century without specific statutory authority to do so).

502. See UCMJ arts. 18, 56. Article 18, UCMJ, states: "[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter." *Id.* art. 18. Article 56, UCMJ, states that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." *Id.* art. 56.

503. See generally MCM, *supra* note 8.

504. See *id.* pt. I, ¶ 4 ("The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part[s] I-V).").

505. See *id.* pt. I discussion.

506. See Maggs, *supra* note 501, at 116-17. Maggs identifies three reasons that courts should not dismiss the supplementary materials in the *Manual* as irrelevant. First, the staff that prepared the materials has significant expertise in military law and actually drafted many of the rules in the *Manual*. Second, because of the sometimes limited access to research materials in the field, judge advocates often must rely on the supplementary materials to give advice to clients and commanders. Third, there is a long-standing judicial practice of deferring to an agency's own interpretation of the statutes it enforces. See *id.*

the *Manual* over the years.<sup>508</sup> Nothing in the UCMJ or in the *Manual* itself prevents the President from amending the *Manual* to clarify his policy in a manner that also happens to overrule a decision of the CAAF. Indeed, the power to amend the *Manual* provides the President with the ability to reign in the CAAF should its opinions hinder the efforts of the armed forces to

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507. In practice, of course, there is a deliberate process of amendment that ensures consensus among the services and other interested governmental agencies. In a treatise on court-martial procedure, Frances Gilligan and Fredric Lederer succinctly explain the process of *Manual* amendment:

The Manual is kept current by the Joint Service Committee on Military Justice. This is a committee consisting of the officers responsible for criminal law in the armed forces (including the Coast Guard), augmented by representatives from the Department of Defense General Counsel's Office and the Court of Military Appeals. This body serves primarily as a policy-making one. The actual drafting work is customarily done by the Joint Service Committee on Military Justice Working Group, consisting of subordinates of the Committee's members. Changes may be initiated by the Working Group or drafted in response to the Committee's direction. No amendment is usually possible, however, without Committee endorsement. Proposed Manual changes must be coordinated with the Department of Transportation (because of the Coast Guard), the Attorney General and OMB. The President of course has the final decision. Changes in the Manual are inherently political, and absent unusual political machination, no change is likely to be made that does not have substantial backing, if not full consensus.

1 FRANCES A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-54.00 n.137 (1991).

508. See generally MCM, *supra* note 8, app. 25 (containing executive orders dating from 1984 that modified various provisions of the *Manual*). Of course, as with other areas of military justice, some reformers object to the current process of amending the *Manual*. In recent years, the *Military Law Review* has published an interesting debate on the issue. Compare Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 166 MIL. L. REV. 237 (2000) (suggesting that the *Manual* amendment process is flawed because it does not include input from a broad enough base of participants, and suggesting adoption of a military judicial conference rule-making process), with Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000) (opining that Barry's suggested changes would yield little actual benefit to the rule-making process while imposing additional administrative burdens on the system) and Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's "Cautious Skepticism Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process,"* 166 MIL. L. REV. 37 (2000) (questioning the basis for Maggs's assertion, and reiterating Barry's belief that the process must change).

make the military justice system work under actual conditions in the field. As one commentator has observed:

The President, as Commander in Chief, is primarily responsible for the maintenance of order, morale, and discipline in the armed forces and the system of military justice is one of the principal means of maintaining them. It is essential to national safety that the President have sufficient power to make the system of military justice work effectively under the conditions which actually exist in the forces . . . .<sup>509</sup>

The simplest way to clarify the President's policy, uphold the statutory panel-selection provisions of the UCMJ, and overrule *Wiesen* is to amend Rules 503(a) and 912(f)(1)(N) of the Rules for Courts-Martial.<sup>510</sup> Amending the *Manual* permits the President to ensure that the military justice system continues to operate efficiently in the field, while at the same time avoiding the potential drawbacks of seeking to overturn *Wiesen* in the

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509. William R. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 868 (1959), quoted in Maggs, *supra* note 501, at 110.

510. The full text of the proposed rule changes, along with suggested discussion and analysis language, is at Appendix A, *infra*. The proposals at Appendix A are adapted from two different proposals that the JSC has considered for dealing with the problems created by *Wiesen*. The first proposal, from the DOD Office of the General Counsel, would have amended R.C.M. 912(f)(1)(N) and its discussion to clarify that the existence of a command or supervisory relationship between two or more members of a court-martial panel, even where such members constitute a majority sufficient to reach a finding of guilty, would not constitute grounds for a challenge for cause. Huestis E-mail, *supra* note 496.

The second proposal, from the Criminal Law Division of the Army Office of The Judge Advocate General, is more sweeping. It would amend R.C.M. 503(a) to clarify that supervisory and command relationships do not disqualify members detailed to a court-martial; modify R.C.M. 912(f)(1) to make actual bias the standard for granting challenges for cause, as well as removing the discretionary language of R.C.M. 912(f)(1)(N) and replacing it with a list of non-discretionary criteria; and change R.C.M. 912(f)(4) to conform military practice to the federal rules of procedure by eliminating the waiver rule that permits an accused to preserve a challenge issue for appeal by using a peremptory challenge against a member who was unsuccessfully challenged for cause and stating that the peremptory would have been used against another member. OTJAG Information Paper, *supra* note 474.

Supreme Court or forcing the military justice system to modify its practices in accordance with *Wiesen*.

Rule 503(a) provides the procedures for detailing members.<sup>511</sup> A new paragraph, R.C.M. 503(a)(4), would make clear that command or supervisory relationships are not disqualifying: “(4) *Members with a Command or Supervisory Relationship*. The Convening Authority may detail members with a command or supervisory relationship with other members and such relationships shall not disqualify any member from service on a court-martial panel.”<sup>512</sup> This revision reflects pre-*Wiesen* practice and long-standing jurisprudence of both the COMA and the CAAF that senior-subordinate relationships, in and of themselves, do not automatically disqualify members from sitting on a panel.<sup>513</sup>

To further tighten up the provisions for challenging members, R.C.M. 912(f)(1)(N) should be amended by adding a second sentence: “The existence of a command or supervisory relationship between two or more members of a court-martial panel (even where such members constitute a majority sufficient to reach a finding of guilty) shall not constitute grounds for removal for cause.”<sup>514</sup> This sentence would specifically overrule *Wiesen*, support the subjective selection criteria of UCMJ Article 25(d)(2), and make clear a presidential policy that such relationships between panel members are an expected and accepted aspect of the military justice system. It would, moreover, support past rulings of the military appellate courts that senior-subordinate relationships, standing alone, are not a valid basis for a challenge for cause.<sup>515</sup> It would also preserve for trial and appellate courts the ability to exercise discretion and ensure that, within the

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511. MCM, *supra* note 8, R.C.M. 503(a).

512. *See infra* Appendix (listing proposed rule changes in their entirety).

513. *See, e.g.*, United States v. Bannworth, 36 M.J. 265, 268 (C.M.A. 1994) (holding that a senior-subordinate relationship between court members did not automatically disqualify the senior member from sitting on the panel).

514. *See infra* Appendix.

515. *See, e.g.*, United States v. Blocker, 32 M.J. 281, 286-87 (C.M.A. 1991) (“The mere fact of a rating relationship between members, like a senior-subordinate relationship, does not generally give rise to a challenge for cause.”).

policy constraints set by Congress and the President, the court-martial is “free from substantial doubt as to legality, fairness, and impartiality.”<sup>516</sup>

If the President amends the *Manual* to overrule *Wiesen*, sound policy and principles would constrain the CAAF from holding the new *Manual* provision invalid. When a *Manual* provision does not conflict with the Constitution or the statutory provisions of the UCMJ, the appellate courts have generally shown great deference to the President.<sup>517</sup> Moreover, a court creates separation-of-powers issues when it purports to invalidate a policy choice that the President personally has made or approved.<sup>518</sup> The President not only has statutory authority to create rules to govern courts-martial, but he also has his inherent constitutional powers as Commander in Chief. Thus, appellate courts should not lightly disturb clear expressions of presidential policy in the *Manual*.

In summary, amending the *Manual for Courts-Martial* presents the simplest and most effective method of solving the problems *Wiesen* has created for the military justice system.<sup>519</sup> The proposed rules are consistent with the UCMJ, past practice in the military, and the needs of a system that must be effective under a wide variety of conditions worldwide. Fur-

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516. MCM, *supra* note 8, R.C.M. 912(f)(1)(N). A rule change that requires actual bias and establishes a set list of mandatory criteria goes too far and could create potential constitutional issues. Trial and appellate courts must retain a credible ability to watch over the military justice system and exercise discretion to ensure that the system meets contemporary standards of fairness and due process.

517. *See* Maggs, *supra* note 501, at 105 n.48 (citing several cases in which the military appellate courts have expressed the principle that they should attempt to follow the President’s intent in promulgating the *Manual*).

518. *See id.* at 108-10. According to Maggs, there are three primary reasons that separation of powers principles apply when the appellate courts invalidate provisions of the *Manual*. First, executive orders necessarily embody policy choices because the President has complete control over their contents. Second, Congress has assigned to the President the task of creating rules and has invested some discretion in him. Third, the President and his advisers have special knowledge about the needs and concerns of the military that is not available to appellate courts. *See id.*

519. Reformers have also recognized the utility of amending the *Manual* to affect the panel selection system. Kevin Barry, for instance, has suggested that the *Manual* might be amended to require random selection of court-martial panel members. *See* Barry, *A Reply to Captain Maggs’s “Cautious Skepticism,” supra* note 508, at 48-49 (“To suggest that improvements in the system of selection of court-members could not, or should not, or would not be expected to come by regulation, is to ignore what has seemed not only possible and plausible, but also necessary, to numerous commentators.”). There is certainly no harm in beating the reformers at their own game and amending the *Manual* to counteract the CAAF’s erosion of the constitutionally sound and eminently useful practice of discretionary convening authority panel selection.

thermore, they clearly articulate a presidential policy that appellate courts will find difficult to tamper with in future cases.

#### B. The Deep Fight: Changing the Terms of the Debate

The current debate on the role of the convening authority in the military justice system is cast in terms that place military justice in an unflattering light. The American military justice system has been depicted as the dinosaur of all modern civilian and military justice systems, an anachronism that stubbornly clings to the outmoded idea of personal command involvement in critical matters of justice at the expense of the individual.<sup>520</sup> Ironically, proponents of change have not been able to mount successful attacks on the actual fairness of the system; indeed, the statutory protections of the UCMJ doom such attacks to failure. It is the perception of bias or unfairness they attack.<sup>521</sup> By framing the debate in terms of perception rather than reality, reformers avoid the inconvenience of empirical or factual support for their premise that the system “looks bad” and must change. Defenders of the system are therefore placed at a profound disadvantage—forced to fight on terms of the opposition’s choosing.

It is time to change the terms of the debate to include a discussion of how reforms match up with the constitutional framework and operational mission of the military justice system. Congress created the American military justice system as a legislative court system in furtherance of its enumerated constitutional power to make rules for the government of the military.<sup>522</sup> The modern UCMJ was designed as a legislative compromise to provide individual rights while still retaining the paramount role of the commander in administering military justice.<sup>523</sup> In the Preamble to the *Manual for Courts-Martial*, the President has declared, “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in

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520. See generally Barry, *supra* note 25 (claiming that the U.S. military justice system once led the world, but now has fallen sadly behind).

521. See, e.g., *supra* note 315 and accompanying text.

522. See *supra* Section II.D.

523. See *supra* Section II.C.3.

the military establishment, and thereby to strengthen the national security of the United States.”<sup>524</sup>

Instead of asking how the U.S. military justice system compares to the military justice systems from other political traditions or even the American civilian criminal jury system, the debate should be framed in terms of how proposed changes match the congressional values embodied in the UCMJ and the President’s declaration of the purposes for military justice. If a proposed change reduces efficiency, adds complexity, and degrades the ability of American commanders to promote good order and discipline in the armed forces, it matters little that the change brings the military justice system closer to an idealized concept of justice. Congress long ago rejected the idea that the “justice” element outweighs the “military” element of military justice.<sup>525</sup>

In furtherance of that end, this section addresses the theoretical and practical reasons that command involvement in the appointment of court members is critical to our military justice system. First, the section discusses the legal responsibilities shouldered by the commander and the effect that removing his authority over the military justice system would have. Closely related to this is the role of the military justice system in wartime and the necessity of retaining command involvement under conditions of combat or similar exigencies. Second, this section examines the benefits that service members enjoy as a result of command appointment of court members. When the debate on the practice of convening authority selection of panel members is framed in terms of its benefits to the military hierarchy and the individual service member, it becomes apparent that command involvement is critical in maintaining the distinctive military

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524. MCM, *supra* note 8, pt. I, ¶ 3.

525. See H.R. REP. NO. 81-491, at 8 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE (Hein 2000). In its report on the UCMJ, the House Committee on Armed Services specifically addressed the balance between an idealistic concept of justice and operational reality:

We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.

*Id.*

character of the military justice system and that current practices are superior to proposals for reform.

*1. How Discretionary Selection of Panel Members Benefits the Command*

As a threshold matter, it is important to recognize one of the hard truths about the military justice system that is often left unsaid: there is no point in its existence if it cannot meet the needs of military commanders. General of the Army Dwight D. Eisenhower testified to this effect before a meeting of the New York Lawyers' Club in 1948, in the midst of the debates on the Uniform Code of Military Justice:

I know that groups of lawyers in examining the legal procedures in the Army have believed that it would be very wise to observe, in the Army and in the Armed Services in general, that great distinction that is made in our Government organization, of a division of power. . . . But I should like to call your attention to one fact about the Army, about the Armed Services. *It was never set up to insure justice.* It is set up as a servant, a servant, of the civilian population of this country to do a job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established. . . . *So this division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders cannot be as separate as it is in our own democratic government.*<sup>526</sup>

General Eisenhower, well versed in the realities of command, was not simply spouting a cliché. His statement reflected the responsibility and burden of command that remains a viable part of the system today.

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526. General Dwight D. Eisenhower, Remarks to the New York Lawyer's Club (1948), *quoted in* Sherman, *supra* note 54, at 35 (quoting Letter from New York State Bar Association to Committee on Military Justice 4 (Jan. 29, 1949)) (emphasis added).

*a. Total Responsibility, Authority, and Lawful Influence on the System*

In civil society, there is no responsibility analogous to that of a commander. The Army doctrinal definition of the commander's role captures its encompassing nature: "Command is vested in an individual who has *total responsibility*. The essence of command is defined by the commander's competence, intuition, judgment, initiative, and character, and his ability to inspire and gain the trust of his unit. Commanders possess authority and responsibility and are accountable while in command."<sup>527</sup>

Some military justice reformers pay a condescending lip service to the responsibility of the commander even as they seek to take it away. For instance, the Cox Commission recognized that "[d]uring hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command."<sup>528</sup> The Commission also affirmed that it "trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial."<sup>529</sup> Yet the Commission recommended removing the commander, whom it trusts implicitly, from the military justice system.<sup>530</sup>

A paradox is at work here, the assumption that one can remove the commander from the system, while still retaining its efficacy, vitality, and utility to him. This hopeful aspiration clashes hard against the experiences of leaders such as General Eisenhower and General William Westmoreland, who have commanded large forces in combat and administered military justice systems. A major part of the military mission, what sets it apart from civilian life, is the "commitment to mission accomplishment in obedience to lawful authority."<sup>531</sup> The commander is, necessarily, the center of this world.

One might ask what any of this has to do with justice and the appointment of court members. The answer is not especially subtle, but no less

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527. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 1-1 (31 May 1997) [hereinafter FM 101-5] (emphasis added).

528. COX COMMISSION, *supra* note 26, at 5.

529. *Id.* at 7.

530. *See id.*

531. General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 2, 44 (1980).

true because of that: Responsibility and authority must go hand in hand. Civil society recognizes the responsibility of commanders and holds them accountable even for the criminal actions of their subordinates.<sup>532</sup> Careers, lives, and international relations between nations can all be affected by the discipline or indiscipline of individual service members.<sup>533</sup> To hold a commander responsible for good order and discipline, without a corresponding grant of authority over the system or the disposition of his personnel involved in it, places him and the system itself in an untenable position.<sup>534</sup>

Through his role in sending cases to courts-martial and selecting panel members, the commander is able to exert lawful control over the military justice system.<sup>535</sup> The cases he refers to courts-martial communicate his sense of acceptable and unacceptable conduct. In appointing subordi-

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532. See, e.g., James R. Carroll, *General's Promotion Opposed over Handling of Gay Soldier's Death at Fort Campbell*, COURIER J. (Louisville, Kentucky), Oct. 25, 2002, at 1A, LEXIS, Newsgroup File, All (discussing efforts to block Major General Robert T. Clark's nomination to Lieutenant General based on the murder of Barry Winchell at Fort Campbell during Clark's command); Calvin Sims, *General Bows to Show Remorse for Marine Held in Sex Offense*, THE PLAIN DEALER, July 27, 2000, at 5A, LEXIS, Newsgroup File, All (recounting how the commanding general of Marine forces personally apologized to the Governor of Okinawa for an incident in which one of his nineteen-year-old Marines fondled a fourteen-year-old Okinawan girl).

533. See Pamela Hess, *Army Extends Review of Kosovo Unit*, UNITED PRESS INT'L, Oct. 4, 2000, LEXIS Newsgroup File, All (reporting that senior Army officials had ordered a review of a command climate that allegedly tolerated misbehavior by soldiers in 3d Battalion, 504th Parachute Infantry Regiment, 82d Airborne Division, following the rape and murder of an eleven-year-old Kosovar girl by a noncommissioned officer in the unit); Chalmers Johnson, *U.S. Armed Forces Are on Tenterhooks in Okinawa; Military Island Residents Were Shocked by a Girl's Rape in 1995. What Would They Do if There Was a Serious Air Accident?*, L.A. TIMES, Sept. 3, 1999, at B7, LEXIS Newsgroup File, All (discussing the repercussions when several Marines gang-raped an Okinawan girl, and noting that the U.S. Marine 3d Division was almost forced to leave).

534. See, e.g., Written Comments of Walter Donovan, BrigGen USMC (ret.) to the Cox Commission (Feb. 28, 2001), reprinted in COX COMMISSION, *supra* note 26, app. C. General Donovan warned, with respect to removing commanders from the selection process, "Don't hobble them to administrative poohbahs, choosing their members for courts, officials who have zero operational responsibility." *Id.* General Donovan recounted some of his own experiences as a commanding officer of a line unit in which he faced "daily headaches on the issue of who was available to perform 'unexpected' tasks." *Id.*

535. Cf. Memorandum from John M. Economidy to Cox Commission, subject: Appointment of Court-Martial Members by Convening Authority 1 (Nov. 28, 2000), reprinted in COX COMMISSION, *supra* note 26, app. C. In answer to the Cox Commission's question, should court-martial members be appointed by a jury office rather than the convening authority, Mr. Economidy replied, "Absolutely not. The military mission is to fight and win wars. Maintaining discipline through the military justice system is a responsibility of the convening authority in conducting the overall military mission." *Id.*

nates to courts-martial, he fulfills several goals. He reinforces his priorities through the personnel he appoints to the court. If the courts-martial process is meaningful to him, he appoints his most trusted subordinates, using criteria similar to what he would employ in matching personnel with other missions; if the process means little to him, he sends the lazy and the expendable to judge his soldiers. Either way, he sends a message. In addition, he fulfills a training function through the operation of the military justice system, ensuring that the next generation of leaders is prepared to administer the system.

It is important to emphasize the difference between lawful influence over the military justice system, which involves carefully selecting the cases that go to trial and the members that sit in judgment of them, and unlawful command influence, which consists of attempting to exercise coercion or unauthorized influence over the action of a court-martial or its members as to findings and sentence.<sup>536</sup> Lawful influence is a function of command, closely related to the core responsibilities of a commander to care for and discipline his troops. Unlawful influence is not only a crime, it is a poor management and command practice. The best commanders will avoid arbitrary and reckless meddling with the military justice system, as they would in any other aspect of command.<sup>537</sup> Service members are, after all, their human capital.<sup>538</sup>

#### *b. Combat and the Military Justice System*

The ultimate test of the military justice system occurs in combat, of which there are two critical aspects: the role of military justice in control-

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536. See UCMJ art. 37(a) (2002).

537. Justice Harry Blackmun wrote of the relationship between the statutory protections of the UCMJ and the incentive a commander has to avoid arbitrary treatment of his troops:

[T]he fearful specter of arbitrary enforcement of the articles, the engine of the dissent, is disabled, in my view, by the elaborate system of military justice that Congress has provided to servicemen, and by the self-evident, and self-selective, factor that commanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.

Parker v. Levy, 417 U.S. 733, 763-64 (1974) (Blackmun, J., concurring).

538. Cf. Pound, *supra* note 24, at 24 (quoting the chief Navy spokesman to the effect that no one relishes prosecuting service personnel because they are human capital).

ling the behavior of soldiers actually involved in combat, and its ability to operate effectively as a system under combat conditions. An effective system of military law can provide an additional motivating factor to prevent combat misconduct, which could include desertion, mistreatment of civilians, or crimes against humanity. The reality is that “[s]ervice members are frequently thrust into dirty and dangerous places, equipped with weapons of truly awesome destructive power,” where they have responsibility for their own lives and the well being of many others.<sup>539</sup> According to Generals Westmoreland and Prugh,

The costs of misconduct in combat are truly incalculable. . . . Because of its effect on [other soldiers], because the military law may give just the additional strength at just the right moment to prevent disastrous disobedience or flight, because it distills a *habit* of obedience to lawful orders so that compliance is second nature, for all of these reasons military law does remain as a valuable military motivator.<sup>540</sup>

It is axiomatic that the commander, whose authority in combat must be unquestioned, should occupy a place at the apex of the military justice system.

Operating a military justice system under combat conditions requires flexibility, ingenuity, and the ability to control resources, particularly human capital. A World War II case, *Wade v. Hunter*,<sup>541</sup> illustrates that combat operations can have an impact on the administration of military justice. The accused in *Wade* had been tried by a general court-martial for the rape of a German woman.<sup>542</sup> After the court closed for deliberations, but before it announced findings, it requested a continuance to hear from critical witnesses who had not been able to attend the trial because of sickness.<sup>543</sup> Before the court could reconvene, the accused’s parent unit, the 76th Infantry Division, advanced deep into Germany, far enough from the site of the offense to make it impracticable for the court-martial to reconvene. The commanding general of the 76th Infantry Division withdrew the charges and transferred them to Third Army, which in turn transferred them to Fifteenth Army, the unit that now had responsibility for the town in which the offense occurred. The Fifteenth Army commander convened

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539. Westmoreland & Prugh, *supra* note 531, at 45 (1980).

540. *Id.* at 48.

541. 336 U.S. 684 (1949).

a new general court-martial, which convicted the accused of the rape and sentenced him to life in prison.<sup>544</sup>

On collateral attack, the accused sought a writ of habeas corpus, claiming he had been subjected to double jeopardy. The district court granted the writ, but the Court of Appeals for the Tenth Circuit reversed, and the Supreme Court affirmed.<sup>545</sup> The Court recognized that the tactical situation, coupled with U.S. Army policy that offenses would be tried in

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542. *Id.* at 686. The facts in *Wade* illustrate how the military justice system must cope with the fast-paced environment of combat. On 13 March 1945, the 76th Infantry Division entered Krov, Germany. The next afternoon, two German women were raped by men in American uniforms. Two soldiers from the division, including the petitioner, were arrested upon charges they had committed the offense. 76th Infantry Division continued its advance. Two weeks later, it had advanced twenty-two miles into Germany to a town called Pfalzfeld, where the trial was held. The court-martial heard evidence and argument of counsel and closed to consider the case. However, later that day the court re-opened and requested a continuance to hear from the parents of the victim and also the victim's sister-in-law, who was in the room when the rape occurred and could assist in identification of the assailants. *Id.* at 685-86. The 76th Infantry Division continued its advance. A week later, before the court had reconvened, the Commanding General withdrew the charges and ordered the court-martial to take no further action. He transferred the charges to his higher command, Third Army, explaining that the tactical situation had made it impossible for the division to try the case in the vicinity of the offense within a reasonable time. Third Army, meanwhile, had also advanced deeply enough into Germany that it was impracticable for any Third Army unit to try the case in the vicinity of the offense. Accordingly, the Third Army commander transferred the case to the Fifteenth Army commander, now responsible for the area in which the offense had occurred, who convened a court-martial. *Id.* at 687.

543. *Id.* at 686 n.2. This was a permissible proceeding under the Articles of War and *Manual for Courts-Martial* of the day. *See id.* at 691 n.7.

544. *Id.* at 692. At trial, the petitioner claimed double jeopardy because of the previous trial, but his motion was denied. It is unclear from the Supreme Court opinion whether the new court heard the evidence anew or relied on the record of trial. However, the court acquitted the co-accused and convicted the petitioner. *Id.* at 687. An Army board of review in Europe filed a unanimous opinion that the double jeopardy claim should have been sustained. The Assistant Judge Advocate General disagreed and filed a dissenting opinion. The Commanding General of the European Theater confirmed the sentence, thus leading to the petitioner filing a writ of habeas corpus in federal district court. *Id.* at 692-93 (Murphy, J., dissenting).

545. *Id.* at 684.

the vicinity where they occurred to facilitate the involvement of witnesses, made the unusual procedure necessary.<sup>546</sup>

A key factor in the Court's opinion was the recognition that the general court-martial convening authority required control over his personnel to carry out his tactical mission. If this meant dissolving the court-martial and transferring it to another command, so be it. "Momentous issues," wrote the Court, "hung on the invasion[,] and we cannot assume that these court-martial officers were not needed to perform their military functions."<sup>547</sup> The order to dissolve the original court-martial was made by a commanding general who was "responsible for convening the court-martial and who was also responsible for the most effective military deployment of that Division in carrying out the plan for the invasion of Germany."<sup>548</sup> The commander's responsibility to prosecute the war trumped his responsibility to prosecute the accused.

One should not assume that the days of courts-martial in a combat zone are over. Despite some doubt as to the vitality of the judicialized UCMJ under "military stress,"<sup>549</sup> Operations Desert Shield and Desert Storm demonstrated that the system could still work under combat conditions. The 1st Armored Division conducted three general courts-martial, one special court-martial, and six summary courts during the four months that the division participated in Desert Shield and Desert Storm. Two of the general courts-martial and the special court-martial were held within days of the beginning of combat operations.<sup>550</sup> Conducting the courts-martial required the dedication of resources available only to the command: a UH-60 Black Hawk helicopter to ferry the trial counsel, defense counsel, and military judge to field locations; generators; tents; and per-

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546. *See id.* at 691-92. The Court relied on a long-standing rule that a trial could be discontinued "when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.* at 690.

547. *Id.* at 692.

548. *Id.* at 691-92.

549. *See, e.g.,* Westmoreland & Prugh, *supra* note 531, at 4 (based on over-judicialization of the UCMJ, the authors conclude that it is incapable of performing its intended role during time of military stress).

550. COLONEL FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 188 (2001).

sonnel.<sup>551</sup> A third general court-martial, fully contested, featured court proceedings held in three countries: Saudi Arabia, Iraq, and Kuwait.<sup>552</sup>

The 1st Armored Division commander was able to use the military justice system to reinforce discipline at a critical time. Soldiers in the Division were “surprised, if not shocked” upon learning that a court-martial would be held the night before the attack on Iraq was to begin, but it sent a message to them that high standards and military justice were important to their commander.<sup>553</sup>

A commander who has no control over the disposition of court-martial personnel will have little incentive to use the military justice system in a combat zone. In the Desert Storm example, a court-martial selection method that used random procedures, the edicts of a far-off “administrative poohbah,” or a central court-martial administrator would have interfered considerably with the commander’s judgment to employ the personnel under his command as he saw fit. With random selection, the commander could not have predicted which officers would be required for a court-martial panel. Because of the potential impact on operations, he might have resisted the decision or put off the court-martial until a later date, thereby losing the advantages of holding the proceedings in a combat zone on the eve of combat. He also might have resisted the idea of providing tents, generators, and helicopters to a central court-martial administrator from a far-off command. Conversely, a central court-martial administrator might not have shared the commander’s view of the seriousness of the offense or the necessity of trying it on location just before the commencement of operations.

In short, the military justice system must retain its martial roots and character to fulfill its varied missions. The commander must always have the flexibility and control over personnel or resources to ensure that the military justice system meets the needs of his command under a variety of circumstances. The current system offers such flexibility; the reforms, despite their assurances to the contrary, do not.

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551. *See id.* at 188-90.

552. *Id.* at 189.

553. *Id.* at 190.

## 2. *How the Current System Benefits the Accused*

The JSC has recognized that “public perceptions of the court-martial member selection process are often based on limited information and misunderstanding.”<sup>554</sup> Worse, legal commentators tend to feed on this, generally focusing their criticisms on misperceptions.<sup>555</sup> In turn, these criticisms have spilled over to the popular press. A recent article in a national news magazine picks up the claim that the system is unfair because the convening authority wields prosecutorial discretion, hand-picks the jury, has the ability to approve findings and sentence, and exercises clemency power.<sup>556</sup> The article cites the military’s courts-martial conviction rate as proof that the system is actually unfair and is stacked to convict.<sup>557</sup> A public that bases its opinion of the military justice system on published misperceptions and misleading comparisons with the civilian criminal justice system cannot be expected to have either an accurate or favorable view of the military justice system.

If the frame of reference is changed, perhaps the system will not seem so one-sided and unfair. When evaluated in terms of the benefits it offers to the accused—particularly in comparison to the civilian jury system—discretionary convening authority selection of panel members appears to be a fair system that confers significant due process and tactical advantages to an accused.

So, let us posit the average, reasonable citizen—someone who knows little about the military justice system, but has an open mind and is willing to learn. It stands to reason that such a person would benefit from an accurate introduction to the court-martial panel process, from selection and appointment through trial.

### *a. Selection Process and Panel-Member Qualifications*

Suppose this citizen learned how the actual assignment process took place. Would she find it shocking that a commander, using information

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554. JSC REPORT, *supra* note 32, at 47.

555. *Id.*

556. *See* Pound, *supra* note 24, at 21-22.

557. *Id.* at 22 (claiming a 97% conviction rate for courts-martial in fiscal year 2001). Among its weaknesses, the article does not compare the military conviction rate with civilian conviction rates, fails to differentiate between convictions and guilty pleas, and neglects to break down the conviction rate by type of court-martial.

provided to him by subordinate staff specialists and subordinate commanders, selects members on a best-qualified basis using criteria of age, education, experience, training, length of service, and judicial temperament?<sup>558</sup> Would it make a difference to the citizen if she understood that the commander has total responsibility for all operational aspects of command, including the disposition and assignment of personnel?<sup>559</sup> How would she feel if she knew the accused would face a panel of individuals with considerable experience within military society and a higher education level than the typical civilian jury?<sup>560</sup> What if she learned that a court-martial panel, unlike a civilian jury, is also charged with the judicial function to pass sentence on the accused?<sup>561</sup> The citizen might be favorably impressed with a system that produces “blue-ribbon panels,” particularly if she were aware that the civilian jury system has come under attack because random selection methods tend to produce juries with lower education levels and experience, thereby degrading the quality of justice in civilian courts.<sup>562</sup>

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558. UCMJ art. 25(d)(2) (2002); *see also* Lamb, *supra* note 25, at 128-29 (discussing the common method for member selection by which a convening authority solicits nominations from subordinate commanders for his consideration based on the criteria of UCMJ Article 25(d)(2), and noting that historically, more than 87% of jurisdictions use this method); Young, *supra* note 25, at 104-05 (noting that most general court-martial convening authorities must rely on subordinates and special staff officers for nominations).

559. *See* FM 101-5, *supra* note 527, at 1-1.

560. As the Court of Military Appeals has observed, UCMJ Article 25(d)(2) criteria can tend to produce relatively senior panels. *See* United States v. Nixon, 33 M.J. 433, 434 (C.M.A. 1991). The military has a higher level of formal education than civilian society. Of the civilian population, 24.3% have a bachelor's degree or higher, whereas 89.9% of officers have a bachelor's degree or higher. In the enlisted ranks, more than 97.4% have at least a high school diploma/GED or higher, compared to 82.8% of the civilian population. *See* MFRC REPORT, *supra* note 373.

561. *See* UCMJ art. 51(a) (discussing voting procedures by members of a court-martial on findings and sentence). *See also* MCM, *supra* note 8, R.C.M. 1006 (establishing the procedures members must use in proposing and voting for sentences).

562. Some commentators believe that random selection methods tend to be skewed towards selection of less educated and experienced segments of society. The better-educated members of society are often able to escape jury duty, and during voir dire, lawyers tend to use peremptory challenges to strike educated jury members. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFTSTRA L. REV. 377, 458-469 (1996). A proposed solution is to select jurors using criteria such as education or previous trial experience. *Id.* at 457.

*b. Forum Selection Rights*

Suppose this citizen knew that the military accused, unlike his civilian counterpart, had the absolute right to select the type of forum that would hear his case—judge alone, officer panel, or in the case of enlisted personnel, a panel consisting of officers and at least one-third enlisted personnel?<sup>563</sup> What if she learned that an accused could make his decision with prior knowledge of the identities of the military judge and the individuals who would be on the panel, and had access to portions of their personnel files and the ability to inquire into their reputations for justice and fairness?<sup>564</sup> These procedures grant greater rights to a military accused than are available to his civilian counterpart.

*c. The Panel at Trial*

Suppose the citizen knew that an accused on trial for a serious offense would be fully acquitted and would not have to endure a hung jury and a re-trial if just one-third of the panel was not convinced beyond a reasonable doubt?<sup>565</sup> What if she were aware that through the judicious use of challenges, the accused's counsel could actually stack the numbers statistically in his favor for acquittal?<sup>566</sup> What if the citizen knew that at trial

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563. Compare UCMJ art. 16 (classifying the types of courts-martial and granting the accused the right to choose trial by members or by judge alone) and *id.* art. 25(c)(1) (granting an enlisted accused the right to demand trial by general or special court-martial with a membership consisting of no less than one-third enlisted personnel), with FED. R. CRIM. P. 23(a) (granting a criminal defendant the right to trial by judge alone only if the judge and the prosecutor agree to it). In the federal criminal system, the prosecutor is the gatekeeper of the accused's forum rights; there is no constitutional right to a trial by judge alone. See *United States v. Singer*, 380 U.S. 24 (1965) (upholding the procedure of Federal Rule of Criminal Procedure 23(a), and noting that there is no constitutional right to trial by judge alone).

564. See Young, *supra* note 25, at 117-18 (noting that in practice, but not as a matter of right, convening authorities have permitted the accused to know the names of the court members before electing a forum).

565. UCMJ art. 52(a)(2) (two-thirds majority required for conviction); see also *id.* art. 60(e)(2) (forbidding reconsideration or revision of any finding of not guilty of any specification).

566. See Smallridge, *supra* note 25, at 375-79 (thoroughly explaining the "numbers game" and providing a statistical analysis of court membership that is favorable to the accused).

the members of the panel would listen to the evidence, take notes,<sup>567</sup> question witnesses,<sup>568</sup> and engage meaningfully in the process?<sup>569</sup>

What if the citizen understood the sanctity of oaths to the military mind and realized that integrity is a way of life to most service members?<sup>570</sup> Suppose the citizen knew that the UCMJ absolutely forbids any attempts to influence the action of a court-martial in any way, including performance ratings of the court members or counsel?<sup>571</sup> As an additional protection to the accused, members in a court-martial vote by secret written ballot,<sup>572</sup> in contrast to the open voting in a civilian jury.

A citizen who knew all these things, but was aware of the conviction rate at military courts-martial, might nevertheless question a system in which the vast majority of accused were convicted. Wouldn't one expect her mind to change, however, if she knew that the conviction rate for con-

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567. See MCM, *supra* note 8, R.C.M. 921 (explaining that members can take their notes, if any, with them into deliberations).

568. See *id.* MIL. R. EVID. 614 (granting all parties, including the members, the right to call, question, cross-examine, or recall witnesses at courts-martial).

569. Again, these are areas where military court-martial practice is superior to civilian practice. A jury that cannot question witnesses is hindered in its ability to function as a fact-finder. Civilian jurors typically are not permitted to take notes or question witnesses. Some commentators have suggested that permitting them to do so would improve the quality of justice because note-taking aids in recollection of the evidence, focuses the attention of the juror on the proceedings, and lessens the time for deliberation. See Smith, *supra* note 562, at 496-501.

570. An excellent example of this occurred in the trial of Lieutenant William Calley for the My Lai massacre. A member of the panel, Colonel Ford, received orders to refrain from any exposure to news accounts of the My Lai massacre nearly one year before the trial was actually held. During that year, whenever he saw a news flash about My Lai on the television, he left the room, and whenever he saw a newspaper headline about My Lai, he read no further. See *Calley v. Callaway*, 519 F.2d 184, 211 (5th Cir. 1975). This type of integrity and obedience to orders is by no means atypical in the military, and the accused benefits greatly from panel members who have taken an oath "to faithfully and impartially try, according to the evidence, their conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5 (1 May 2002).

571. See UCMJ art. 37 (2002). Article 37, UCMJ, forbids any person subject to the Code from trying to influence the action of a court-martial in any way. Furthermore, the article forbids any person subject to the Code from considering or evaluating a court member's duty on a court-martial as part of an effectiveness, fitness, or efficiency report. See *id.*

572. See *id.* art. 51(a) (providing for vote by secret written ballot on findings, sentence, and challenges when there is no military judge present).

tested courts-martial and contested jury cases was almost exactly the same?<sup>573</sup>

Now, suppose this citizen became aware that reformers wanted to change the military justice system to remove the commander from the process and introduce jury selection concepts such as random selection. Initially, one might expect her to view this favorably; most people accept the idea that juries are the bulwarks of freedom. But let us suppose she also learned the truth about reform efforts, that they offer only illusory change, that every single reform effort rigs the random selection system because the consequences of statistically honest random selection are inconceivable to reformers and incompatible with military needs. Moreover, reforms do double damage by increasing the administrative burden on the command and, in changing the criteria from "best qualified" to "merely available," degrade the quality of the panels. Centralizing the court administrative functions, as has been done in Great Britain, brings with it delay and inefficiency. The result is a system whose usefulness to the commander has been greatly compromised.

One would expect that an informed citizen, aware of all the facts, would look favorably upon the rights offered by the military justice panel system to the accused. Selection of panel members is, like many other decisions a commander makes, simply another exercise of operational

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573. In fact, the conviction rate for general courts-martial is actually slightly lower than for felonies in federal district courts or in the seventy-five largest metropolitan areas of the United States. The overall conviction rate for general courts-martial in fiscal year 2001 was 95% (1675 convictions out of 1756 total cases in the services combined). This figure was obtained by adding together the total reported general court-martial convictions from the Army, Navy (including the Marines), Air Force, and Coast Guard and dividing by the total reported number of general courts-martial held. See CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT (2001), available at <http://www.armfor.uscourts.gov/Annual.htm>. In the federal system, the conviction rate for felonies (including guilty pleas) that were not dismissed was 98.37% percent. This figure was obtained by dividing the total number of convictions in the federal system in fiscal year 2001 (68,156) by the total number of cases that were not dismissed (69,283). See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414 (Ann L. Pastore & Kathleen Maguire eds., 2001), available at <http://www.albany.edu/sourcebook>. In the seventy-five largest metropolitan areas, the felony conviction rate was about 95%. See *id.* at 452.

In the early 1970s, General Hodson discussed the fallacy of arguments that the military justice system is unfair because of its conviction rates. He noted that the rate was nearly the same for the military (94%) as for the civilian system (96%) on cases that went to trial. A high acquittal rate, he observed, can indicate that improper cases are going to juries or that prosecutors are unprepared. See Hodson, *supra* note 25, at 52.

responsibilities. It provides a benefit to the commander because, by selecting his best-qualified subordinates, he ensures the quality of justice meted out to his soldiers is high, and it demonstrates his commitment and vision that justice is important to him. The system is fair and flexible, and it offers the military accused choices that are unavailable to civilian criminal defendants. The panels are well-educated, honest, and faithful to their oaths. The accused has a statistically similar likelihood of acquittal in a military court, but has the benefit of using the panel system and the two-thirds majority rule to structure the panel in his favor.

The system of command control of military justice meets the needs of the command and the nation, but just as important, it meets the needs of the accused. The statutory framework Congress created in the UCMJ strikes a balance that should not lightly be disturbed. At this point in history, it is fair to assume that the Framers and several generations of Congress knew what they were doing in retaining a system of command control over panel member appointment.

#### V. Conclusion

The practice of discretionary convening authority selection of court-martial panel members dates back centuries and has been an integral part of the American military justice system since the Revolution. It is deeply rooted in the earliest efforts of armies to employ military tribunals as a means of ensuring good order and discipline while providing due process and fundamental fairness to the accused. Congress, which has the constitutional responsibility to make rules for the government of the armed forces, has consistently rejected efforts to remove the convening authority from the process of selecting panel members. In promulgating the UCMJ in the late 1940s, Congress struck a fair and practical balance between individual rights and the power of commanders to administer the military justice system.

Modern-day reformers seek to upset that balance. The UCMJ has proven its worth as a fair system of justice that grants due process to individuals, while preserving the flexibility, efficiency, and ease of administration necessary in a military setting. No one seriously questions its actual fairness. Nevertheless, concerned that the role of the convening authority in selecting panel members presents the appearance of evil, many seek to remove the convening authority from the panel selection process, replacing him with either a central court-martial administrator or with modified

versions of the random selection system used in the federal courts. In *United States v. Wiesen*,<sup>574</sup> a judicially activist majority of the CAAF demonstrated a willingness to place significant limits on the ability of commanders to select subordinate commanders to serve on court-martial panels. Because of *Wiesen*, commanders are no longer free to choose their best-qualified subordinates to serve on panels if a certain percentage of them are from the same chain of command.<sup>575</sup>

It is time to fight back in defense of a system that produces “better educated and more conscientious panels . . . than any other system would.”<sup>576</sup> To counter the damage done by *Wiesen*, the President should use his rule-making authority under UCMJ Article 36(a) to amend the *Manual for Courts-Martial* and make clear his intent that command and supervisory arrangements are no impediment to service on court-martial panels. In the long term, proponents of the system must shift the terms of the debate. So long as reformers can fight on a ground of their own choosing, they will have the upper hand. Conversely, when the question of panel member selection is cast in terms of its proper constitutional context, its utility to commanders, its fairness to the soldier, and its relationship to the purposes of military justice, it becomes evident that Congress struck the proper balance in retaining the convening authority’s discretionary ability to select panel members.

Honor, integrity, and trustworthiness define the character of American military commanders, just as discipline and adherence to the rule of law form the backbone of the most effective military the world has ever known. Divesting convening authorities of the power to appoint panel members to attain a more idealistically pure system of justice exalts form over substance and the military justice system over the military. In the words of Generals William Westmoreland and George Prugh, “There is a fundamental anomaly that vests a commander with life-or-death authority over his troops in combat but does not trust that same commander to make a sound decision with respect to justice and fairness to the individual.”<sup>577</sup>

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574. 56 M.J. 172 (2001).

575. See *supra* text accompanying notes 28-30.

576. Cooke, *supra* note 25.

577. Westmoreland & Prugh, *supra* note 531, at 58.

### Appendix

Proposed Rule Changes<sup>578</sup>

R.C.M. 503(a)(4):

(4) Members with a command or supervisory relationship. The Convening Authority may detail members with a command or supervisory relationship with other members and such relationships are not disqualifying.

#### Analysis

This section is intended to clarify that the rules of procedure in trial by courts-martial do not disqualify members with command or supervisory relationships from serving on courts-martial. Specific grounds for challenge of members and related procedures are in RCM 912(f). The existence of command or supervisory relationships among members, including a number sufficient to convict, does not constitute grounds for challenge under RCM 912(f)(1)(N). *See* United States v. Greene, 43 C.M.R. 72, 78 (1970) (“Congress, in its wisdom, made all commissioned officers eligible for consideration to serve on courts-martial [subject to the limitations contained in Article 25, UCMJ].”). In 1968, Congress amended Article 37, UCMJ, by adding subparagraph (b), prohibiting anyone preparing an effectiveness, fitness, or efficiency report (or any other such document) from “(1) consider[ing] or evaluat[ing] the performance of duty of any such member as a member of a court-martial.” UCMJ art. 37(b) (2002). *See also* RCM 912(f), Analysis.

R.C.M. 912(f)(1)(N):

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. The existence of a command or supervisory relationship between two or more members of a court-martial panel (even when such members constitute a

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578. Underlining indicates language added to or changed from the existing Rules.

majority sufficient to reach a finding of guilty) shall not constitute grounds for removal for cause.

#### Discussion

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

The second sentence of subsection (N) is intended to clarify that factors to be considered under Rule 912(f) do not include the existence of command or supervisory relationships among the members of a court-martial panel. The existence of such relationships do not evidence “implied bias” or otherwise constitute a violation of this Rule. As such, the second sentence is intended to overrule the holding of the Court of Appeals for the Armed Forces in *United States v. Wiesen*, 56 M.J. 172 (2001).

#### Analysis

In light of the finding in *United States v. Wiesen*, 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2002), this section is intended to clarify the President’s position that command or supervisory relationships between members, even when such members constitute a majority sufficient for conviction, are not a basis for removals for cause. It is common for court-martial members to have command or supervisory relationships with other members. Such relationships between two or more members of a court-martial panel (even when such members constitute a number sufficient to reach a finding of guilty) are not grounds for challenge under this rule. See, e.g., *United States v. Blocker*, 32 M.J. 281, 286-87 (C.M.A. 1991) (noting that the mere fact of a rating or senior-subordinate relationship between members does not generally give rise to a challenge for cause, and observing that “the omnipresence of these relationships suggests a sua sponte inquiry by the judge was not required”); *United States v. Murphy*, 26 M.J. 454, 455 (C.M.A. 1988) (“We hold that the Court of Military Review erred as a matter of law in applying a per se disqualification predicated solely on the fact that a senior member of the court-martial is involved in writing or endorsing the effectiveness reports of junior members.”); *United States v. Bannwarth*, 36 M.J. 265, 268 (C.M.A. 1984) (find-

ing that “a senior-subordinate relationship between court members does not automatically disqualify the senior member”); *United States v. Deain*, 17 C.M.R. 44, 52 (C.M.A. 1954) (“It may be conceded that the mere fact that the senior, or other member of the court, coincidentally has the duty to prepare and submit a fitness report on a junior member, in and of itself, does not affect the junior’s ‘sense of responsibility and individual integrity by which men judge men.’”) (citations omitted).